TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 201

ALBERT RAUH, PETITIONER,

vs.

TRAVIS COUNTY, TEXAS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED

(16,831.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 267.

ALBERT WADE, PETITIONER,

vs.

TRAVIS COUNTY, TEXAS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 5, 1899.

a UNITED STATES OF AMERICA,
Fifth Judicial Circuit.

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun on the third Monday of November, 1896, and held in the court-room of said court, in the city of New Orleans, before the Honorable Don A. Pardee, United States circuit judge for the fifth judicial circuit, and the Honorable William T. Newman, United States district judge for the northern district of Georgia.

ALBERT WADE, Plaintiff in Error,
vs.
TRAVIS COUNTY (TEXAS), Defendant in Error.

Be it remembered that heretofore, to wit, on the 6th day of August, 1896, a transcript of the record of the above-styled cause, from the circuit court of the United States for the western district of Texas, was filed in the office of the clerk of the United States circuit court of appeals, in the words and figures following, to wit:

1 United States Circuit Court of Appeals, Fifth Circuit.

ALBERT WADE, Plaintiff in Error,
vs.
TRAVIS COUNTY, Defendant in Error. } No. 527.

In the above-entitled cause it is stipulated, between the parties thereto, by their respective attorneys, that the following parts of the record shall be printed, viz:

Plaintiff's first amended original petition, and Exhibits A, B, C, and B 2; defendant's first amended original answer; order sustaining demurrers and dismissing cause; opinion of the court; plaintiff's bills of exception Nos. 1 and 2, and plaintiff's assignments of error.

And it is further stipulated that the remaining parts of the record shall not be printed unless otherwise ordered by the court.

GEO. F. PENDEXTER,
T. W. GREGORY, AND
WEST & COCHRAN,
Attorneys for Plaintiff in Error.
GEO. CALHOUN, *County Att'y, and*
FISET & MILLER,
Attorneys for Defendant in Error.

Endorsed: No. 527. Albert Wade *vs.* Travis County. Stipulation as to printing record. Filed Aug. 6, 1896. J. M. McKee, clerk.

Opinion of the Court. Filed March 13, 1896.

In the Circuit Court of the United States for the Western District of Texas, Austin Division.

ALBERT WADE
vs.
TRAVIS COUNTY.

Suit is brought by the plaintiff, who is a citizen of the State of Illinois, against Travis County, a municipal corporation of the State of Texas, to recover upon interest coupons which have been detached from 47 certain bonds, issued by the defendant, for the purpose of building an iron bridge across the Colorado river. Defendant demurs to the petition.

Plaintiff is the owner and holder of coupons representing the interest due on all of said bonds, April 10th, 1893, April 10th, 1894, and April 10th, 1895, for $60 each, and the suit is brought to recover the amount thereof, with interest. The contract pro-
2 viding for the construction of the bridge and the issuance of county bonds in payment therefor, was executed by the King Iron Bridge & Manufacturing Company, on the one hand, and the duly constituted county authorities on the other, July 3rd, 1888. Briefly stated, by the terms of the contract, the bridge company agreed to erect the superstructure of an iron bridge over the Colorado river in a thorough workman-like manner, the work to begin on the 3rd day of August, 1888, and to be completed on the 15th day of November following. In consideration of the erection of the bridge, the county agreed to pay the bridge company the sum of $47,000 in bonds, payable in 20 years and bearing six per cent. interest, payments to be made as follows: 50 per cent. of the value of the work as the work progressed and the balance on the final acceptance and completion of the bridge.

Before entering upon the merits of the case a preliminary question has been suggested by the district judge, who is sitting with the circuit judge, touching the disqualification of the former to participate in the decision. That question is as follows: The district judge is a resident and citizen of Travis county, Texas, and a tax-payer thereof. This suit involves the validity of bonds and coupons issued by the county. The question arises: Has the district judge such direct pecuniary interest in the result of the suit as disqualifies him from sitting in the case? Authorities examined by the court leave the question in some doubt, and for the purpose of having it definitely determined by an appellate tribunal, we have concluded to hold that disqualification on the part of the district judge does not exist. See U. S. Rev. Stat., § 601; City of Dallas *vs.* Peacock, 33 S. W. Rep., 220; City of Austin *vs.* Nalle, 85 Tex., 520; Moses *vs.* Julian, 45 N. H., 52; Peck *vs.* Essex Freeholders, 21 N. J. Law, 656; Gregory *vs.* R. R. Co., 4 Ohio State, 675; Pearce *vs.* Atwood, 13 Mass., 324; The State *et al. vs.* Crane, 36 N. J. Law, 394;

Board of Justices *vs.* Fennimore, 1 N. J. Law, 190. And we suggest to counsel the propriety of reserving proper exceptions in order that the point may be conclusively settled by the court of appeals.

The merits of the controversy involve interesting though not difficult questions for solution. The demurrers of defendant challenge the plaintiff's right to recover on the ground that, at the date of the execution of the contract between the bridge company
3 and the county, no provision was made to pay the interest on the debt created and provide a sinking fund as required by the organic law. The petition and accompanying exhibits fail to disclose that the county commissioners' court made special provision, by order or resolution, touching a sinking fund or interest on the particular bonds in question. But it is insisted by plaintiff that on the 23rd day of February, 1888, the contract having been executed on July 3rd, 1888, the county commissioners' court, at a regular term thereof, levied taxes for the year 1888 on all taxable property of the county, as follows: "An annual ad valorem tax of 20 per cent. for general purposes; and an annual ad valorem tax of 15 per cent. for road and bridge purposes on each $100 worth of property situated in said county and taxable by law;" and further, that on the 13th day of February, 1889, the commissioners' court of the county levied taxes for the year 1889, as follows: "An ad valorem tax of 15 per cent. on each $100 worth of property for road and bridge purposes, and an ad valorem tax of 5 cents on each $100 worth of property to create a sinking fund for bridge bonds and to pay the interest of said bonds." In this connection it is further alleged in the petition that the defendant delivered to the bridge company, on its contract for erecting the bridge, bonds as follows: On December 6th, 1888, 5 bonds; on December 22nd, 1888, 10 bonds; on February 12th, 1889, 10 bonds, and on July 3rd, 1889, the remaining 22 of said 47 bonds. The contention of the plaintiff is, that, in making the general tax levies above set forth, the county intended to provide for a sinking fund and interest on the bonds issued to the bridge company. The defendant, however, insists that at the date of the execution of the contract for erecting the bridge, the commissioners' court should have made a distinct and specific provision for such interest and sinking fund. The constitutional provision bearing upon the question is the following: Section 7, article 11. "But no debt for any purpose shall ever be incurred in any manner by any city or county, unless provision is made at the time of creating the same for levying and collecting a sufficient tax to pay the interest thereon, and to provide at least two per cent. as a sinking fund."

The imperative mandate of the constitution is that no debt for any purpose shall ever be incurred in any manner by a
4 county unless provision is made at the time of creating the same for levying and collecting a sufficient tax for the interest and sinking fund above specified. "The word 'debt,'" says Mr. Justice Denman, "as used in the constitutional provisions above quoted, means any pecuniary obligation imposed by contract, except such as were, at the date of the contract, within the lawful and

reasonable contemplation of the parties, to be satisfied out of the current revenues for the year, or out of some fund then within the immediate control of the corporation." McNeill *vs.* City of Waco, 33 S. W. Rep., 324, citing authorities. And we think, as intimated in McNeill *vs.* City of Waco, that a contract entered into for the construction or erection of any public improvement, authorized by law, would be the creation or incurring of a debt within the meaning of the constitution. It follows that, contemporaneously with the execution of the contract by the defendant and bridge company, to wit: July 3rd, 1888, the county commissioners' court should have made provision, by levy of a tax or otherwise, for a sinking fund, and the interest on the bonds issued for the erection of the bridge. See Millsaps *vs.* City of Terrell, 60 Fed. Rep., 193 (Cir. Ct. App'ls); Berlin Iron Bridge Co. *vs.* City of San Antonio, 62 Fed. Rep., 882. The levy made by the commissioners' court, in February, 1888, could not be held applicable to the bonds in controversy, for the manifest reason that the contract for the erection of the bridge was not then in existence nor even in contemplation of the parties, so far as the allegations of the petition disclose. The general levy made in February, 1889, cannot be held applicable to the bonds of the bridge company for two reasons. First: It was made some six months after the execution of the contract, and second: The order of the commissioners' court, authorizing the levy, makes no reference whatever to the bonds in controversy nor to the contract between the county and the bridge company. In other words, no provision was made, by levy of a tax or otherwise, by the county commissioners' court, either contemporaneously with the execution of the contract, or subsequently, for a sinking fund and interest on the bonds, issued for the construction of the bridge. See Bassett *vs.* City of El Paso, 88 Texas, 169. Hence, we are led to the conclusion that the bonds and, as a necessary corollary, the coupons detached therefrom are invalid and not enforceable as such against the county.

The demurrers of the defendant should be sustained, and it is so ordered.

T. S. MAXEY,
District Judge.

McCormick, circuit judge, concurs.

Endorsed: No. 2284. Albert Wade *vs.* Travis County. Opinion. Filed Mar. 13, 1896. D. H. Hart, clerk, by O. H. Millican, deputy.

Plaintiff's First Amended Original Petition. Filed March 19, 1896.

ALBERT WADE
vs.
TRAVIS COUNTY. } No. 2284.

And now comes the plaintiff and under leave of the court files this its 1st amended original petition, in lieu of its original petition filed on the 18th day of January, 1896:

In the Circuit Court of the United States for the Western District of Texas, at Austin.

ALBERT WADE
vs.
TRAVIS COUNTY.

To the honorable judges of said court:

Your petitioner, Albert Wade, hereinafter styled plaintiff, brings this suit against Travis County, hereinafter styled defendant, and respectfully shows and represents to the court:

First. That plaintiff is a resident citizen of the county of Madison, in the State of Illinois; that the defendant, Travis County, is a body corporate and politic by virtue of the laws of the State of Texas, being one of the counties of said State, and situated in the western district of Texas, and within the jurisdiction of this court.

That D. A. McFall, a resident citizen of Travis county, Texas, is the duly qualified and acting county judge of said Travis county.

Second. That heretofore, to wit, on July 3rd, 1888, the defendant, being fully authorized so to do, entered into a contract with the King Iron Bridge Manufacturing Company, of Cleveland, Ohio, by the terms of which said company contracted and agreed with defendants to build, paint, and make complete and have ready for the use of defendant, by the 15th day of November, 1888, the superstructure of an iron highway bridge for public use over the Colorado river, at a point where the Montopolis road crosses
6 said river, in Travis county, Texas. In consideration of which, defendant, by the terms of said contract, agreed and undertook to pay to said company the sum of $47,000.00 for said bridge, said amount to be payable in the bonds of said defeddant, payable in twenty years from date, bearing six per cent. interest per annum. A copy of said contract is hereto annexed, marked "Exhibit A," and made a part hereof. That said bridge was and is a permanent improvement.

Third. That prior to the making of said contract, to wit, February 23d, 1888, the defendant, acting by and through its commissioners' court, at a regular term of said court, levied taxes for the year 1888, and subsequent years until otherwise ordered, on all of the property situated in Travis county, and made taxable by law, as follows:

An annual ad valorem tax of 20c. for general purposes; and an annual ad valorem tax of 15c. for road and bridge purposes, on each $100 worth of property, situated in said county and taxable by law. A copy of the order levying said tax is hereto attached and marked "Exhibit B," and made a part hereof.

3½. That thereafter, to wit, on November 13th, 1888, the defendant, acting by and through its commissioners' court, at a regular term of said court, levied for the purpose of buying or constructing bridges, an annual ad valorem tax of 15c. on the $100.00 to pay interest and create a sinking fund for the redemption of eleven bonds, of the denomination of one thousand dollars each, bearing 8 % in-

terest, running until the 10th of April, 1899, a certified copy of which order is attached hereto and marked "Exhibit B 2," and made a part hereof.

Fourth. That thereafter, to wit, on the 13th day of February, 1889, defendant, acting by and through its commissioners' court, at a regular term of the said court, by order duly passed, levied taxes on all property situated in Travis county, and taxable by law, for the year 1889, and each and every year thereafter, until otherwise ordered, as follows:

An ad valorem tax of 15c. on each $100 worth of property for road and bridge purposes, and an ad valorem tax of 5c. on each $100 worth of property to create a sinking fund for bridge bonds, and to pay the interest of said bonds. A copy of said order is hereto attached, marked "Exhibit C," and made a part hereof.

7 Fifth. Plaintiff alleges that the taxable values of Travis county for the year 1887 was, to wit..... $13,455,320.00
For the year 1888..... 13,507,790.00
For the year 1889..... 14,163,180.00

and that the tax of 15c. on the $100 for road and bridge purposes levied on February 23rd, 1888, and February 13th, 1889, and 5c on the $100, to create a sinking fund and pay interest on bridge bonds, so levied by the defendant as aforesaid, and the said levy of November 13th, 1888, were each sufficient to pay all interest to accrue on said bonds, and provide a sufficient sinking fund for their redemption at maturity, and that said taxes were so levied by the defendant for the purpose, and did make provision to pay the interest to accrue on said bonds, and to provide a sinking fund for their redemption at maturity, and that said taxes so levied were each sufficient to pay the interest and create a sinking fund on all other valid bonds previously issued by defendant for road and bridge purposes, as also on the bonds above described.

5½. That a general tax of 15c. for road and bridge purposes, levied for the year 1888, and the additional general levy of 15c. for 1889, and special levy of 5c. to create a sinking fund for bridge bonds, and to pay interest on same, have been collected for the years 1888 and 1889, and for every year thereafter, by the proper officers of Travis county, and paid into the county treasury, as was also the said general tax of 15c. for the year 1888.

Sixth. That on December 6th, 1888, pursuant to the terms of said contract, and in *paty* payment of the bridge therein contracted for, the defendant executed and delivered five of its bonds, numbered one to five, inclusive, for the sum of one thousand dollars each, due on April 10th, 1908, and having attached thereto coupons for sixty dollars each, except the first coupon, representing the annual interest to become due on said bonds up to the day of their maturity. Said bonds and coupons being, by their terms, payable to bearer at the treasury of the county of Travis.

Seventh. That thereafter, to wit: on December 22nd, 1888, the defendant issued and caused to be delivered ten of its bonds of like

character and denomination, and for the same purposes, as those above described, numbered 6 to 15, inclusive; and on February 12th, 1889, caused ten more of said bonds to be issued and
8 delivered, said bonds being numbered 16 to 25, inclusive. And afterwards, on July 3rd, 1889, caused twenty-two of said bonds, numbered 26 to 47, inclusive, to be issued and delivered, thus making the total of bonds provided for in said contract, and that each bond bore the date on which it was delivered and bore interest from that date.

Eighth. Plaintiff further says, that each and all of said bonds were signed by J. M. Brackenridge, then county judge of Travis county, and countersigned by Frank Brown, then county clerk of said county, and registered by Ed. Anderson, then county treasurer of said county, and that each and all of the coupons were signed by said Brackenridge, county judge, and countersigned by said Brown, county clerk.

8½. That at the time said agreement was entered into with the King Iron Bridge Manufacturing Company, the fund to be realized from said levy of February 23, 1888, had not been appropriated for any other purpose by said county, or at least a sufficient portion of it remained unappropriated to pay the interest and sinking fund on said $47,000.00 of bonds, and that when the said 15 bonds were delivered in December 1888, said fund, as well as the fund to be realized from the levy of November 13th, 1888, was still unappropriated for other purposes to an extent sufficient to pay the interest and sinking fund on said 15 bonds; that when said ten bonds were delivered on February 12, 1889, said funds were still unappropriated for other purposes, to an extent sufficient to pay the interest and sinking fund on said 10 bonds; and that when said 22 bonds were delivered, on July 3rd, 1889, there was a portion of each of the funds to be realized from the said 15¢. and 5c. levies made on February 13th, 1889, unappropriated for other purposes, sufficient to pay the interest and sinking fund on said 22 bonds.

Plaintiff further alleges that at and prior to February 23rd, 1888, when said first tax levy was made by the commissioners' court of said Travis county, said court had in contemplation and intended to build the bridge across the Colorado river at the point where said Montopolis road crossed the same, and also had in contemplation the building of other bridges of minor importance in said Travis county. That said court at its said term and at previous terms had deliberated upon and determined to erect said bridge and to pay for the same in bonds and made said levy for the
9 purpose and with the view of providing a fund to run from year to year, sufficient to pay the annual interest and to provide the sinking fund therefor, required by law. But plaintiff alleges that no minute or entry upon the minutes of said court was ever made, showing such previous deliberations and determination on the part of the said court.

Plaintiff further alleges that by the terms of said tax levy of February 23rd, 1888, the said court made the same to operate and run from year to year thereafter, and that, by the subsequent orders

levying taxes, as hereinbefore set out, the said court conformed to the provisions of said first order, and levied the full amount of fifteen cents on the one hundred dollars' worth of taxable property in said Travis county, for the purpose of constructing and providing roads and bridges in said county, including said Montopolis bridge.

And plaintiff further alleges that when said contract was entered into by said county with the King Iron Bridge Manufacturing Company, and at all times thereafter, when said county delivered its said bonds in payment for said bridge, the said different tax orders and levies were in full force and effect, as shown by the minutes of said court; and that, in delivering said bonds, the said different levies became part of said contract against said county.

Ninth. That the defendant, by its acts aforesaid, caused each and all of said bonds thereto attached to be placed on the market for sale, and that afterwards, to wit: about the 1st of January, 1893, plaintiff, for a full and valuable consideration in open market, purchased the coupons, representing the interest due on all of said bonds, on April 10th, 1893, April 10th, 1894, and April 10th, 1895. And that he is still the legal owner and holder of the same.

That each of said coupons, except the first, save in number and date of maturity, is in words and figures as follows, to wit:

"$60. Due April 10, 18—. No. —.

The County of Travis will pay to bearer, at the treasury of the county of Travis, sixty dollars, on April 10th, 1895, being interest for one year on bond No. —.

J. M. BRACKENRIDGE,
County Judge of Travis County.

FRANK BROWN,
County Clerk of Travis County."

10 Tenth. That on the — day of ——, 1895, plaintiff presented all of said coupons to the county commissioners' court of said Travis county, and demanded the allowance thereof; that said court neglected and refused to audit and allow said coupons or any part thereof. That afterwards, to wit: on the 16th day of January, 1896, he presented all of said coupons to the treasurer of Travis county, Texas, at the treasury of said county, and demanded payment thereof, which was refused, and the said coupons are now all due and unpaid.

Eleventh. That the order hereinbefore referred to, levying taxes for the year 1889, was passed at a regular term of the said commissioners' court, to wit: on February 13th, 1889, the court having adjourned over from the following day, and on the day immediately following the order authorizing the delivery of ten of said bonds, to wit: Nos. 16 to 25, inclusive, as aforesaid.

Premises considered: plaintiff prays that the defendants be cited to answer hereto by service of process on the said D. A. McFall, county judge, as aforesaid, and upon final hearing, for judgment for the full amount due on said coupons, to wit: the sum of eight

thousand four hundred and sixty ($8,460) dollars, as principal, and interest at six per cent. per annum on each of said coupons from the dates that they respectively matured.

For general relief, costs, etc.

T. W. GREGORY,
WEST & COCHRAN,
GEO. F. PENDEXTER,
Attorneys for Plaintiff.

"EXHIBIT A."

It is hereby ordered by the commissioners' court of Travis county that the contract entered into by and between said commissioners' court and the King Iron Bridge and Manufacturing Company, of Cleveland, Ohio, be and the same is hereby ratified and adopted; and that the contract as aforesaid be made a part of this order, and be made a matter of record, to wit: This contract made this 3rd day of July, 1888, by and between the King Iron Bridge and Manufacturing Company, of the city of Cleveland, and State of Ohio, party of the first part, and Travis County through its legal representatives, the commissioners' court of the county of Travis, of the State of Texas, party of the second part, witnesseth:

11 That the party of the first part contracts and agrees with the party of the second part to build, paint, and make complete, and have ready for use by the 15th day of November, 1888, for the party of the second part, the superstructure of an iron highway bridge, cantilever construction, over the stream called the Colorado river, at a point where the Montopolis bridge crosses said stream, in the county of Travis, and State of Texas, namely: Extreme length of bridge, 1,000 feet, five spans, roadway eighteen feet. Specifications attached hereto form part of this contract. All the materials for said bridge are to be furnished by the said party of the first part, are to be of good and suitable quality, and the work is to be done in a thorough, workmanlike manner. And the party of the second part contracts and agrees to pay the party of the first part the sum of $47,000.00 for the said bridge, payable as follows: 50 per cent. of the value of the work as the work progresses, and the balance on the final acceptance and completion of the work, in bonds issued by said county, payable in twenty years, bearing six per cent. interest. And the party of the first part was not to be held responsible for unavoidable delays caused by transportation, the elements, mobs, the enemies of the Government, strikes of workingmen or acts of Providence. The party of the second part reserves the right to negotiate the said bonds. The said party of the first part agreeing to commence work upon the 3rd day of August, 1888, said bridge to be guaranteed by said company to be equal to class B standard copper; and the said party of the first part is to forfeit $50.00 per day after the 15th day of November, 1888. The party of the first part is

to furnish a bond in the sum of $50,000.00 for the faithful performance of said contract.

(Signed) KING IRON BRIDGE & MANUF'NG CO.,
Per S. A. OLIVER & BRO., *Agents.*
J. M. BRACKENRIDGE,
County Judge.
WILLIAM WELLMER,
C. C. Pr. No. 1.
A. G. KEMP, *C. C. Pr. No.* 2.
S. C. GRANBERRY,
C. C. Pr. No. 3
J. W. CLOUD, *C. C. Pr. No.* 4.

In the presence of—

L. T. NOYES AND
P. G. ROACH.

Signed in duplicate.

12 "EXHIBIT B."

FEBRUARY 23, 1888.

And thereupon it is ordered (all the members of the commissioners' court being present) that there be levied and collected an annual county tax on each hundred dollars' worth of the cash value thereof on all real and movable property situated and rendered for taxation in Travis county, until otherwise ordered, to be estimated in the lawful currency of the United States (except so much as is exempted from taxation by the laws of this State), on the first day of January, 1888, and on the first day of January of each and every year thereafter, as follows, to wit:

An annual ad valorem tax of twenty cents for general purposes, an annual ad valorem tax of fifteen cents for road and bridge purposes; an occupation tax upon every occupation taxed by law equal to one-half the rates allowed by law to be taxed for State purposes, except occupations upon which there is a specific rate of taxation, payable in the county, fixed by law.

"EXHIBIT C."

FEBRUARY 13TH, 1889.

And thereupon it is ordered (all members of the commissioners' court being present) that there be levied and collected an annual ad valorem county tax on each one hundred dollars' worth of the cash value thereof, on all real and movable property situated and rendered for taxation in Travis county, until otherwise ordered, to be estimated in the lawful currency of the United States (except so much as is exempted from taxation by the laws of this State), on the first day of January, 1889, and on the first day of January of each an every year thereafter, as follows, to wit:

An annual ad valorem tax of twenty-five cents for general purposes, fifteen cents for road and bridge purposes, court-house and jail tax of five cents; an ad valorem tax of five cents to create a sinking fund for bridge bonds to pay the interest of said bonds, and an occupation tax upon every occupation taxed by law equal to one-half the rates allowed by law to be taxed for State purposes, except occupations upon which there is a specific rate of taxation payable to the county fixed by law.

13 EXHIBIT B 2.

TUESDAY MORNING, *November* 13, *A. D.* 1888.

Court met pursuant to adjournment. Present: Hon. J. M. Brackenridge, county judge, presiding; and county commissioners William Wellmer, A. G. Kemp, S. C. Granberry and John W. Cloud; whereupon the following proceedings were had, to wit:

Whereas, by an act of the legislature of the State of Texas, approved April 4th, 1887, the county commissioners' courts of the several counties of this State are authorized and empowered to issue the bonds of said county with interest coupons attached, for such amounts as may be necessary for the purpose of buying or constructing bridges for public uses within such county, said bonds to run not exceeding twenty years, and bear interest at any rate not to exceed eight per cent. per annum, and to levy an annual and ad valorem tax not to exceed fifteen cents on the one hundred dollars' valuation sufficient to pay the interest on and create a sinking fund for the redemption of said bonds, the sinking fund not to be less than four per cent. on the full sum for which the bonds are issued. And,

Whereas, Travis county, Texas, has already a bonded indebtedness for said purpose of seventy-four thousand dollars, bearing interest at the rate of six per cent. per annum, payable twenty years after date, but redeemable before maturity at the pleasure of the county at any time after three years, and the further issuance of bonds to the amount of eleven thousand dollars, with interest at the rate of eight per cent. per annum for said purpose, will not, with the said seventy-four thousand dollars, make a larger amount of bonds than a tax of ten cents on the one hundred dollars' valuation of property in the said county will liquidate in ten years; and,

Whereas, the further issuance of bonds to the amount of eleven thousand dollars for said purpose is necessary.

It is therefore ordered by the county commissioners' court of Travis county, Texas, in open session at a regular term of said court, and when all the members of said court are present, that bonds of said Travis county, with interest coupons attached, be issued for said purpose of buying or constructing bridges for public uses within said county to the amount of eleven thousand dollars, of the denomination of one thousand dollars each, with interest from date until paid at the rate of eight per cent. per annum, interest
14 payable annually, on the 10th day of April of each year, at the State treasury in Austin, Texas, said bonds to run until

the 10th day of April, A. D. 1899, and redeemable at any time before the maturity at the pleasure of said county, and that the county judge, county clerk and county treasurer of said county be and they are hereby authorized, instructed and required to prepare, execute, register, issue and sell said bonds according to law and this order, and that an annual ad valorem tax of fifteen cents on the one hundred dollars valuation of property subject to taxation in said county be and the same is hereby levied and shall be assessed and collected to pay the interest on and create a sinking fund for the redemption of said bonds, and that the sinking fund herein provided for shall be four per cent. on the full sum for which the said bonds are issued.

J. M. BRACKENRIDGE, *C. Judge.*
W. M. WELLMER, *C. C. Pr.* 1.
A. G. KEMP, *C. C. Pr.* 2.
S. C. GRANBERRY, *C. C.* 3.
J. W. CLOUD, *C. C. Pr. No.* 4.

THE STATE OF TEXAS, }
County of Travis. }

I, Jno. W. Hornsby, clerk of the county court within and for the State and county aforesaid, do hereby certify that the above and foregoing is a true and correct copy of an order made and entered by the commissioners' court of Travis county, Texas, on the 13th day of November, A. D. 1888, as the same appears of record in Book "F" on pages Nos. 154, 155 and 156 of the Minutes of the Commissioners' Court.

Given under my hand and seal of said court, this the 25th day of November, A. D. 1895.

[SEAL.] JOHN W. HORNSBY,
Clerk County Court, Travis County, Texas.

Endorsed: No. 2284. Albert Wade *vs.* Travis County. Plaintiff's 1st amended original petition. Filed March 19, 1896. D. H. Hart, clerk, by O. H. Millican, deputy.

Defendant's First Amended Original Answer. Filed March 19, 1896.

In the Circuit Court of the United States for the Western District of Texas, at Austin.

ALBERT WADE
v.
TRAVIS COUNTY. } No. 2284.

Comes now the defendant in the above styled and numbered cause, and, by leave of the court for that purpose first had and obtained, files this, its first amended answer, in lieu of and as a substitute for its original answer filed February 4th, 1896, and says:

This defendant, demurring generally to plaintiff's first amended

original petition, filed March 19th, 1896, says the same is insufficient in law and does not authorize any recovery, and said petition does not state any cause of action against this defendant, and of this defendant prays the judgment of the court.

GEO. CALHOUN,
County Attorney, and
FISET & MILLER,
Attorneys for Defendant.

And specially excepting to plaintiff's petition, defendant says the same is insufficient, among other things, in these, that:

1. It fails to allege that, at the time the debt was created for which the bonds were issued, upon the coupons of which this suit is brought, any provision was made for the interest and, at least, two per cent. sinking fund upon said bonds.

2. It fails to allege that, at any time, any legal provision was made to raise a fund sufficient for the interest and sinking fund of said bonds.

3. The tax levy of February 23, 1888, was not in contemplation of law any tax levy, because such attempted levy was not made at a regular term of the court.

4. The fifth paragraph of the petition and other parts of said petition setting up that taxes were levied for the purpose, and the levies did make provision to pay the interest on said bonds, are insufficient, in this, that they do not set out and do not purport that said purpose or provisions were predicated on any order or resolution to that effect entered on the minutes of the commissioners' court.

5. Paragraph 3½ of plaintiff's petition and Exhibit B 2 relating thereto should be stricken out, because neither the allegations in said paragraph nor the exhibit show that the bonds in question in this suit were in anywise connected with said order attached as Exhibit B 2, nor do the allegations of said paragraph refer to the bonds here in issue.

6. That part of the petition is insufficient which alleges that the commissioners' court had in contemplation and intended when taxes were levied to build the bridge in question, because it
16 is not shown that any order evincing such intention was made on the minutes or in any other way, and because the petition itself avers that no minute or entry of such intention was made.

Wherefore, this defendant prays the judgment of the court on each of said exceptions.

GEORGE CALHOUN,
County Attorney, and
FISET & MILLER,
Attorneys for Defendant.

And if the general demurrer and special exceptions be overruled, then this defendant denies all and singular the allegations made, and as made in plaintiff's petition, demands strict proof of the same, and of this defendant puts itself upon this country.

And specially answering, this defendant says, that prior to the time of the alleged creation of the debt for which the bonds were issued on the coupons of which this suit is brought, the defendant had issued and delivered and there were outstanding at the time of the creation of the said contract and are now outstanding bridge bonds amounting to $74,000, said issue having been made on May 12th, 1887, under and by virtue of the legal authority of the statute and the constitution, and said bonds were properly issued and a levy was properly made by the commissioners' court to meet the interest and sinking fund to be levied and collected under said bond issue of $74,000, and whatever provisions during the years 1887, 1888, 1889 and 1890 were made for the levy of a tax by the commissioners' court for interest and sinking fund for bridge bonds or for bridge purposes, was made for the purpose of meeting said issue of $74,000, and not the issue made, as alleged by plaintiff, of bonds amounting to $47,000.

Wherefore this defendant says, that at no time was provision made, as the law and the constitution of this State provides, to meet the interest and sinking fund of the said issue of $47,000 of bonds, the foundation of plaintiff's claim, and therefore said bonds are void and invalid and the coupons cannot be recovered upon, of all which this defendant puts itself upon the country.

GEO. CALHOUN,
County Attorney, and
FIS-T & MILLER,
Attorneys for Defendant.

Endorsed: No. 2284. Albert Wade *vs.* Travis County. First amended original answer of defendant, Travis County. Filed M'ch 19, 1896. D. H. Hart, clerk.

17 *Order Overruling Demurrer and Dismissing Cause, July* 13, 1896.

AUSTIN, TEXAS, MONDAY, *July* 13*th*, 1896.

ALBERT WADE
vs.
TRAVIS COUNTY. } No. 2284.

On this the 13th day of July, 1896, was called for trial in its order the cause of Albert Wade *vs.* Travis County, No. 2284, on the docket of this court, and thereupon came the plaintiff, by his attorneys, and the defendant, by its attorneys, and then came on to be heard the general demurrer and special exceptions of defendant, Travis County, filed March 19th, 1896, to the first amended original petition of the said plaintiff, also filed March 19th, 1896, and the argument of counsel on said general demurrer and special exceptions of said defendant to said plaintiff's petition having been heard, it is the opinion of the court that the law is for the defendant, and plaintiff declining to amend his said petition.

It is therefore ordered, considered and adjudged by the court, that plaintiff's cause of action be and the same is hereby dismissed, and that the defendant, Travis County, go hence without day, and that the defendant, Travis County, recover of the plaintiff, Albert Wade, all costs in this behalf expended, for all which let execution issue.

To which said ruling of the court and judgment thereon the plaintiff, Albert Wade, in open court, excepted.

Plaintiff's Bill of Exceptions No. 1. *Filed July* 14, 1896.

In the Circuit Court of the United States for the Fifth Circuit, Western District of Texas, Sitting at Austin.

ALBERT WADE *vs.* TRAVIS COUNTY. } No. —.

Plaintiff's bill of exceptions No. 1.

Be it remembered, that upon the trial of the above entitled and numbered cause, the following proceedings were had:

The district judge, the Hon. T. S. Maxey, presented the question of his disqualification to sit in the trial of this cause, because, as stated by him (and agreed to by plaintiff and defendant), he owned property subject to taxation in the city of Austin, in Travis county, Texas, and was at the date of said trial, a tax-payer of said city and county, which question of disqualification was duly consid-
18 ered by by the court composed of the Hon. A. P. McCormick, circuit judge, and the Hon. T. S. Maxey, district judge.

And, after due consideration, said court held that the Hon. T. S. Maxey, judge as aforesaid, was not disqualified, whereupon said court proceeded to try said cause, to which ruling of the court, the plaintiff then and there in open court excepted, and now prays that this bill of exceptions be signed, sealed and made a part of the record in this cause, which is accordingly done.

Signed July 14, 1896.

T. S. MAXEY, *Judge.*

Endorsed: No. 2284. Albert Wade *vs.* Travis County. Pl't'ff's bill of exceptions No. 1.. Filed July 14, 1896. D. H. Hart, clerk.

Plaintiff's Bill of Exceptions No. 2. Filed July 14, 1896.

In the Circuit Court of the United States for the Fifth Circuit, Western District of Texas, Sitting at Austin.

ALBERT WADE
vs.
TRAVIS COUNTY. } No. —.

Plaintiff's bill of exceptions No. 2.

Be it remembered, that upon the trial of the above entitled and numbered cause, the following proceedings were had therein:

Plaintiff having presented to the court his first amended original petition, filed in lieu of his original petition (which amended petition is set out in this record, and by agreement of parties made in open court is to be considered as incorporated in this bill), the defendant thereupon presented to the court for its action thereon a general demurrer and special exceptions and demurrer contained in its first amended original answer, which said first amended original answer is set out in this record, and by agreement of counsel made in open court, is to be considered as incorporated in this bill, and the court having considered said general demurrer and special exceptions, sustained said general demurrer and special exceptions.

To which ruling of the court in sustaining said general demurrer and special exceptions, plaintiff then and there in open court excepted, and now prays that this bill of exceptions be allowed, signed and filed as a part of the record herein.

And that the first amended original petition and first
19 amended original answer be taken and considered as if incorporated and written into this bill, agreeably to the agreement of counsel made in open court, all of which is accordingly done.

Signed this July 14, 1896.

T. S. MAXEY, *Judge.*

Endorsed: No. 2284. Albert Wade *vs.* Travis County. Pl't'ff's bill of exceptions No. 2. Filed July 14, 1896. D. H. Hart, clerk.

Plaintiff's Assignment of Errors. Filed July 14, 1896.

In the Circuit Court of the United States for the Fifth Circuit, Western District of Texas, Sitting at Austin.

ALBERT WADE
vs.
TRAVIS COUNTY. } No. —.

Comes now Albert Wade and assigns the following as the errors committed against him on the trial of the above numbered and entitled cause:

1. The court erred in holding that the Hon. T. S. Maxey, district judge, was qualified to sit in the trial of this cause, as shown by plaintiff's bill of exceptions No. 1.

2. The court erred in sustaining the defendant's general demurrer to plaintiff's petition.

3. The court erred in sustaining each of defendant's special demurrers to plaintiff's petition.

4. The court erred in holding that no cause of action was set up in plaintiff's petition, and in dismissing this cause from the docket of the court.

Wherefore, said Albert Wade prays that the judgment rendered against him be reversed and the cause remanded.

GEO. F. PENDEXTER,
T. W. GREGORY, AND
WEST & COCHRAN,
Attorneys for Plaintiff in Error.

Endorsed: No. 2284. Albert Wade *vs.* Travis County. Plaintiff's assignment of errors. Filed July 14th, 1896. D. H. Hart, clerk.

20 *Argument and Submission.*

United States Circuit Court of Appeals for the Fifth Circuit, November Term, 1896.

APRIL 28, 1897.

(Extract from Minutes.)

ALBERT WADE
vs.
TRAVIS COUNTY (TEXAS). } No. 527.

This cause was regularly called this day, and was submitted to the court after argument by Mr. J. P. Blair, for plaintiff in error, and by Mr. Franz Fiset, for defendant in error.

Judgment.

November Term, 1896.

JUNE 16, 1897.

(Extract from the Minutes.)

ALBERT WADE
vs.
TRAVIS COUNTY (TEXAS). } No. 527.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the western district of Texas, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed at the costs of the plaintiff in error.

Opinion.

United States Circuit Court of Appeals, Fifth Circuit, November Term, 1896.

Filed June 16, 1897.

ALBERT WADE, Plaintiff in Error,
vs.
TRAVIS COUNTY, TEXAS, Defendant in Error. } No. 527.

Error to the United States circuit court for the western district of Texas.

Before Pardee, circuit judge, and Newman, district judge.

21 NEWMAN, district judge, delivered the opinion of the court:

Suit was brought in the United States circuit court for the western district of Texas, by the plaintiff in error, against the defendant in error, Travis County, Texas, to recover upon interest coupons which had been detached from 47 bonds issued by Travis county, for the purpose of building an iron bridge across the Colorado river. The coupons were for $60 each. The defendants demurred to plaintiff's petition, the demurrer was sustained, and an exception duly entered.

The question in the case was, and is, as to whether the bonds issued by the county of Travis, and from which the coupons sued on were detached, were issued in conformity to law, and to the constitution of Texas on the subject. This question of the validity of the bonds depends first and mainly on the construction of a provision of the constitution of Texas, sec. 7, article XI.

Section 7 is as follows: "All counties and cities bordering on the coast of the gulf of Mexico are hereby authorized, upon a vote of two-thirds of the tax-payers therein (to be ascertained as may be provided by law) to levy and collect such tax for construction of sea walls, breakwaters or sanitary purposes as may be authorized by law, and may create a debt for such works and issue bonds in evidence thereof. But no debt for any purpose shall ever be incurred in any manner by any city or county, unless provision is made at the time of creating the same for levying and collecting a sufficient tax to pay the interest thereon and provide at least two per cent. as a sinking fund; and the condemnation of the right of way for the erection of such works shall be fully provided for."

The contention for the defendant in error is, that the latter clause of this section, that "no debt for any purpose shall ever be incurred in any manner by any city or county, unless provision is made, etc." is applicable to the contract made by the county for the building of this bridge, and that the petition of the plaintiff failing to show compliance with it, the contract is void, the bonds illegally issued and the county not bound for their payment.

The contention on the other hand is, that the language of
22 this last clause must be read in connection with the preceding portion of the section, and taking that section together with existing conditions, and the action of the constitutional convention in connection with the adoption of this section, that this last clause must be held, as the former part of the section, to apply only to the counties bordering on the coast of the gulf of Mexico. It is said that immediately preceding that action of the convention in placing this section in the constitution, a great hurricane had swept over the gulf coast, causing the city of Galveston to be submerged and resulting in great destruction to life and property on the entire coast. It is said that this caused section 7 to be placed in the constitution, and that it must be read and construed in the light of the situation at that time. We do not understand this last clause to be so restricted. It seems to us to be entirely separate from the preceding part of the section, and to refer to all the cities and counties of the State. Judge Maxey so held in the court below, and we agree with him, that this is the proper construction of the section.

This is the view heretofore taken by this court of this section of the constitution of Texas, as will be seen by an examination of the case of Milsap *vs.* The City of Terrell, 60 Fed., 193, and Quaker City National Bank *vs.* Noland County, 66 Fed., 883. While the question made here was not distinctly made in those cases, the court seems to act in both cases upon the assumption that the construction which applies in the latter part of the section to all cities and counties in the State, is the correct one. But even if the question was doubtful here, we would be controlled by the decisions of the supreme court of Texas construing this provision of the State constitution. An examination of the decisions of that court leaves no doubt that its construction is in accordance with that of the circuit judge in the case at bar.

In the opinion of the court in the case of The City of Terrell *vs.* Dissaint, 71 Texas, 770, this language is used: "Section 7 of the same article contains this still more emphatic declaration: But no debt for any purpose shall ever be incurred in any manner by any
23 city or county, unless provision is made at the time of creating the same for levying and collecting a sufficient tax to pay the interest thereon, and to provide at least two per cent. as a sinking fund. In Corpus Christi *vs.* Woesner, 58 Texas, 462, it was intimated that there might be a question whether the provisions quoted applied to cities other than such as have more than ten thousand inhabitants; but the determination of the point was not necessary to the decision of that case, and it was not decided. The question is presented in the case before us, and we are of opinion that they must be held to apply to all cities alike. It is true that section 5 relates mainly to cities having more than ten thousand inhabitants, and provides that they may be chartered by special acts of the legislature, and fixes the limits of their taxing power. Section 7 also relates in the first place to counties and cities upon the seacoast, and authorizes them to levy and collect taxes for the con-

struction of sea walls, breakwaters, and sanitary purposes, and to create debts for these objects. But the provisions we have quoted contain no word or words which restrict their application to the cities previously mentioned in the same section. The language is general and unqualified, and we find nothing in the context to indicate that the framers of the constitution did not mean precisely what is said; that is, that no city should create any debt without providing by taxation for the payment of the sinking fund and interest."

In the case of Nolan *vs.* State, 83 Texas, 182, the latter clause of the section of the constitution under consideration is treated as applying to all counties of the State (p. 200).

It is said that, in deciding the case of The City of Waxahatchie *vs.* Brown, 67 Tex., 519, the court took a different view of this clause of article 7, and in fact restricted its application to cities and counties bordering on the gulf of Mexico, and that decision, it is argued, entered into and became a part of the contract for building the bridge and issuing the bonds in the case here. Without determining whether or how far that decision of the Supreme Court, even if it went to the extent claimed, would have the effect indicated, it is sufficient to say that an examination of that case shows that it was not the intention of the court to construe this clause of the
24 constitution at all. The only mention made in that decision of this provision of the constitution was incidental and only made in the summing up of the different constitutional provisions bearing upon the question under consideration in that case. The question made here was not made there, and there was evidently no intention on the part of the court to decide it. The opinion we entertain of the proper construction of this clause of the constitution, the former decisions of this court, and the decisions of the supreme court of the State of Texas, all combine to sustain the circuit judge in his decision on this question in the court below.

The opinion in Brazoria County *vs.* Youngstown Bridge Company, recently decided in this court, is in harmony with and fully supports the conclusions herein announced.

The judgment of the court below, sustaining the demurrer to the plaintiff's declaration, should be affirmed, and it is so ordered.

Clerk's Certificate.

United States Circuit Court of Appeals for the Fifth Circuit.

I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing 24 pages contain a true copy of the record upon which the cause was heard and determined in the United States circuit court of appeals for the fifth circuit, and of the proceedings had therein, and of the opinion of said court in the case of Albert Wade *vs.* Travis County (Texas), No. 527, as the same remains upon the files and records of said United States circuit court of appeals.

Seal United States Circuit Court of Appeals, Fifth Circuit.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 17 day of March, A. D. 1898.

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

Endorsed on cover: Case No. 16,831. U. S. C. C. of appeals, 5th circuit. Term No., 267. Albert Wade, petitioner, *vs.* Travis County, Texas. Filed March 25, 1898.

25 United States Circuit Court of Appeals, Fifth Circuit.

ALBERT WADE
v.
TRAVIS COUNTY. } No. —.

Stipulation.

It is agreed by the undersigned, counsel of record, that the record now on file in the office of the clerk of the Supreme Court of the United States in the matter of the petition for certiorari in the above-entitled case shall be taken and held as the record of this cause, and that a duly certified copy of this stipulation be attached to the writ of certiorari as part of the return thereto by the clerk of the United States circuit court of appeals for the fifth circuit.

J. P. BLAIR,
T. W. GREGORY,
FRANK W. HACKETT,
Counsel for Albert Wade.
GEO. CALHOUN,
County Attorney, Travis County, Texas.
FRANZ FISET AND C. H. MILLER,
Attorneys for Travis County, Texas.

26 United States Circuit Court of Appeals for the Fifth Circuit.

I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing 1 page is a true copy of the agreement in reference to the return to the writ of certiorari in the case of Albert Wade *v.* Travis County, as the same remains on file and of record in my office.

Seal United States Circuit Court of Appeals, Fifth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 5th day of May A. D. 1898.

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

27 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the fifth circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Albert Wade is plaintiff in error and Travis County, Texas, is defendant in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the western district of Texas, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit
28 court of appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 20th day of April, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

29 [Endorsed:] Case No. 16,831. Supreme Court of the United States. No. 267, October term, 1898. Albert Wade *vs.* Travis County, Texas. Writ of certiorari and return. Filed May 9, 1898.

UNITED STATES OF AMERICA, }
Fifth Judicial Circuit. }

I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, in accordance with agreement of counsel in the within-named case, a certified copy of which is hereto annexed and made a part hereof, for return to the within writ do hereby certify that the transcript of the record of the within-named cause, now on file in the office of the clerk of the Supreme Court of the United States, is a true, full, and perfect transcript of the record in said cause as the same now remains on file and of record in my office.

Seal United States Circuit Court of Appeals, Fifth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 5th day of May, A. D. 1898.

J. M. McKEE,
Clerk U. S. Circuit Court of Appeals, Fifth Circuit.

No. 648. 267.

Brief of Hackett & Blair for

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

Filed April 9, 1898.

No. ——.

ALBERT WADE, *Petitioner*,

versus

TRAVIS COUNTY (TEXAS), *Respondent*.

BRIEF IN SUPPORT OF THE APPLICATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FRANK W. HACKETT,
GEO. F. PENDEXTER,
T. W. GREGORY,
JOSEPH PAXTON BLAIR,
Attorneys for Petitioner.

[illegible]

Supreme Court of the United States.

OCTOBER TERM, 1897.

ALBERT WADE, *Petitioner*,
vs.
TRAVIS COUNTY (TEXAS), *Respondent.* } No. 618.

SUPPLEMENTARY BRIEF FOR PETITIONER.

Upon further consideration it has seemed advisable to submit one suggestion by way of argument upon the point that the facts of this case present an urgent reason for the exercise by the court of its power to grant the writ prayed for in furtherance of justice.

While this power is unlimited, the court very properly requires of itself a great degree of care in exercising it, proceeding slowly so as not unduly to extend the scope of practice under this head, and yet so as to afford relief in a thoroughly deserving case.

The guarded language of the opinion upon the latest occasion where the subject has come under review, emphasizes the necessity of adhering to the position that the questions involved shall be "questions of gravity and importance."

After making it plain that the purpose of Congress in vesting in this court so comprehensive a power is to afford a remedy to prevent injustice, the court continues:

"It is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflicts between two or more courts of appeal, or between courts of appeal and courts of a state, or some matter affecting the interest of this nation in its internal or external relations demands such exercise." *Per* BREWER, J., *Forsyth* v. *Hammond*, 166 U. S., 514.

We respectfully submit that our petition meets the requirements thus stated.

As to the importance of the question involved, it is clear that the real question is, shall relief be denied when it appears from the record that the circuit court of appeals would have reversed its finding had it only retained jurisdiction over the cause.

By this we mean not that the requirement is that *counsel shall think* that the court of appeals would have reversed its finding, but that it appears to this court certain that such, if it retained control, would be the action of the court below.

Reversal, we confidently submit, could be counted on for reasons already advanced in our brief. Obviously the court of appeals supposed that it was following a judicial interpretation already laid down by the supreme court of Texas, of a clause of the constitution of that state.

It appears that subsequently to the announcement of the decision in the federal court, the supreme court of Texas determined the precise question, and that too without reversing a previous decision. The true construction of the meaning of the constitution of Texas has not been reached by pronouncing a former decision of the highest court of that state to have been incorrect. The circuit court of appeals conceived itself bound by a decision of the supreme court of the state of Texas in the construction of the clause in question of the constitution. It plainly appears, however, that as to this the court fell into error. It was not such an

error as results from independent reasoning on the part of the court. It is rather assimilated to an error of fact, in that the federal tribunal had taken as the expression of the highest court of the state a legal conclusion which really did not exist. It is apparent, therefore, that had a motion for rehearing been filed, and continued into the next term, so that the court would have retained jurisdiction of the subject-matter, it would undoubtedly have corrected the error into which it had unwittingly fallen. This plain act of justice the court below cannot now accomplish, however much it may desire to do so.

Here are circumstances, therefore, which afford precisely the occasion for relief that was contemplated by Congress. This case, we believe, presents for the first time that peculiar result, which can but infrequently occur, where the circuit court of appeals is helpless to correct its own record, a record which it would be only too willing to correct, if it had the power. We say therefore with confidence that the question of practice involved is of the highest importance, and that its decision will control a class of cases where the application for relief rests upon grounds that commend themselves as highly meritorious.

FRANK W. HACKETT,
GEO. F. PENDEXTER,
T. W. GREGORY,
JOSEPH PAXTON BLAIR,
For Petitioner.

*** The opinion of the Supreme Court of Texas (BROWN, J.,) in *County of Mitchel* v. *City National Bank of Paducah, Kentucky*, printed in our brief pp. 14–43, is reported in 43 Southwestern Reporter, pp. 880–890.

NOTICE OF FILING PETITION.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

ALBERT WADE, *Petitioner*,
v.
TRAVIS COUNTY, TEXAS. } No. 618.

March 25, 1898.

Take notice that the petitioner, Albert Wade, has this day filed his petition in the Supreme Court of the United States for a writ of certiorari to the United States Court of Appeals, Fifth Circuit, having duly complied with the rules of court in that regard. The petitioner will call up his said petition on Monday, April 11th, 1898, and submit the same with brief in support thereof.

ALBERT WADE.
By his Attorneys:
J. P. BLAIR,
FRANK W. HACKETT.

To George Calhoun,
County Att'y, Travis Co., Tex.
Franz Fisct and Clarence H. Miller,
Att'ys for Travis Co., Tex.

Service of the foregoing notice, time, &c., are hereby waived, and we take cognizance of the contents of said notice hereby, this April 1, 1898.

[Signed] GEORGE CALHOUN,
County Att'y Travis Co.
FRANZ FISCT and C. H. MILLER,
Att'ys for Travis Co.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. ———.

ALBERT WADE, *Petitioner*,

versus

TRAVIS COUNTY (TEXAS), *Respondent*.

BRIEF IN SUPPORT OF THE APPLICATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The grounds upon which petitioner's application for a *certiorari* in this case is based are so simple and of such narrow compass that argument is hardly necessary either to explain or to support them. We shall, however, supplement the statement of the case in the petition by a brief presentation of the following points: 1. The application is not barred by lapse of time, and the delay in making it is not unreasonable under the peculiar facts of the case. 2. The construction of the Constitution and statutes of the State of Texas, announced by the Circuit Court of Appeals in this case, is directly opposed to the construction of same constitutional and statutory law by the Supreme Court of Texas. 3. The Supreme Court of Texas was right, and the Circuit Court of Appeals was wrong, in the construction placed by them respectively on the Constitution and statutes in question.

I.

This application is not barred by lapse of time, and the delay in making it was not unreasonable under the peculiar circumstances of this case.

The decision of the Court of Appeals in this case was rendered on June 16, 1897, at the November, 1896, term of that Court, which expired on June 25, 1897. The Court, with a quorum of judges, did not convene again until January 3, 1898. By rule No. 29 of that Court no application for a rehearing will be entertained unless made before the expiration of the term at which the decision concerned was rendered. The decision of the Supreme Court of Texas, which afforded the means of establishing the error of the Court of Appeals, was not rendered until January 10, 1898. A delay of less than three months after the decision of the State Supreme Court in presenting this application is certainly not unreasonable. We did not, before that decision, have sufficient grounds either for an application to the Court of Appeals for a rehearing or to this Court for a *certiorari*. We had nothing new to present to the Court of Appeals. On the argument we urged the very question afterward decided by the Supreme Court of Texas in the Mitchel county case, and filed a copy of the decision in that case of the Civil Court of Appeals, which had been recently rendered; but, presumably because that was a decision of an inferior State Court, it had no weight, and was not even mentioned by the Circuit Court of Appeals in its opinion. When the Supreme Court of the State of Texas made its authoritative construction of the State Constitution and statutes upon which the decision of our case depends, it was too late, under the rules, to apply to the Circuit Court of Appeals for a rehearing, and the only source of relief left open was in this Court through the writ of *certiorari*.

It is settled by the case of *The Conqueror*, 166 U. S.

110, that the only absolute limitation of time in respect to an application of this kind is twelve months from the date of the judgment complained of, and we are within that limit.

II.

The construction of the Constitution and statutes of the State of Texas, announced by the Circuit Court of Appeals in this case, is directly opposed to the construction of the same constitutional and statutory law by the Supreme Court of Texas.

The correctness of this proposition will at once appear from a simple reading of the two decisions. We shall now briefly compare the facts and the conclusions of law in the two cases.

In the Mitchel county case one of the bond issues, the validity of which was at issue, was one of bonds issued under the authority of the Commissioner's Court of Mitchel county in payment for a county bridge. The authority for the action of the county officials was an act entitled "An act to authorize counties to issue bonds for bridge purposes and to levy a tax to pay the same," being Chapter 18 of the general laws of 1884. Sections 1 and 2 of this act are as follows:

"SECTION 1. *Be it enacted by the Legislature of the State of Texas*, That the County Commissioners' Courts of the several counties of this State are hereby authorized and empowered to issue bonds of said county, with interest coupons attached, for such amounts as may be necessary for the purpose of buying or constructing bridges for public uses within such county, said bonds to run not exceeding twenty years and bear interest at any rate not to exceed eight per cent. per annum.

"SEC. 2. The Commissioner's Court shall levy an annual *ad valorem* tax not to exceed fifteen cents on the one hundred dollars valuation, sufficient to pay the interest thereon, and create a sinking fund for the redemption of said bonds. The sinking fund herein provided for

shall not be less than four per cent. on the full sum for which the bonds are issued."

This act, as stated by the Supreme Court in its decision, was enacted in pursuance of Sec. 2 of Art. 11 of the Constitution of Texas, which provides: "The construction of jails, court houses and bridges, and the establishment of county poor houses and farms, and the laying out, construction and repairing of county roads, shall be provided for by general laws."

In the present case the bonds in question were issued, in payment for a county bridge, under the authority of the County Commissioners' Court of Travis county, whose power to act was derived from an act entitled "An act to authorize counties to buy, construct, or contract for the use of bridges, and to issue bonds and levy taxes to pay for the same, and to repeal all laws in conflict herewith," being chapter 141 of the general laws of 1887. Sections 1 and 2 of this act are identical with the corresponding sections of the act of 1884, and read as follows:

"SECTION 1. *Be it enacted by the Legislature of the State of Texas*, That the County Commissioners' Courts of the several counties of this State are hereby authorized and empowered to issue bonds of said county, with interest coupons attached, for such amounts as may be necessary for the purpose of buying or constructing bridges for public uses within such county, said bonds to run not exceeding twenty years, and bear interest at any rate not to exceed 8 per cent. per annum.

"SEC. 2. The Commissioner's Court shall levy an annual *ad valorem* tax, not to exceed fifteen cents on the one hundred dollars valuation, sufficient to pay the interest thereon, and create a sinking fund for the redemption of said bonds. The sinking fund herein provided for shall not be less than 4 per cent. on the full sum for which the bonds are issued."

This act, like the act of 1884, which it superseded, was passed in compliance with the requirements of Sec. 2 of Art. 11 of the Constitution quoted above.

It appears from the decision of the Court in the Mitchel county case that the Commissioners' Court, at the time the bonds in question were issued or the contract calling for them was made, did not make any provision for levying and collecting a sufficient tax to pay the interest thereof and to provide a sinking fund of at least 2 per cent. It appears from the pleadings and the decision of the Court in the present case that the Commissioners' Court likewise failed to make provision for levying and collecting a sufficient tax, etc., at the time the contract was made and the issue of the bonds ordered. And in both cases the defense was that the omission of the Commissioners' Court to make such provision operated the nullity of the bond issues, because in violation of the mandate contained in Sec. 7 of Art. 11 of the State Constitution.

In neither case was the fact disputed, that, considering the taxable values of the county in the year in which the bonds in question were issued, the exercise of the taxing power within the constitutional limit would be sufficient to pay the interest accruing on the bonds and to provide the sinking fund required by the Constitution and the statute under which they were issued.

Coming to the conclusions of law announced by the two courts, we find that the Circuit Court of Appeals considered that the question of whether the requirements of Sec. 7 of Art. 11 of the State Constitution applied to all cities and counties, whether bordering on the gulf coast or not, had been settled, and that they applied to all municipal corporations wherever situated; but that the Supreme Court of Texas declared that whether that section applied to such bonds as were then in suit was an open question, the decision of which was not necessary in the case before the Court. Section 7 of Art. 11 is as follows: "All counties and cities bordering on the coast of the Gulf of Mexico are hereby authorized upon a vote of two-thirds of the taxpayers therein (to be ascertained as may be pro-

vided by law)to levy and collect such tax for construction of sea walls, breakwaters, or sanitary purposes as may be authorized by law, and may create a debt for such works and issue bonds in evidence thereof. But no debt for any purpose shall ever be incurred in any manner by any city or county, unless provision is made at the time of creating the same for levying and collecting a sufficient tax to pay the interest thereon and provide at least two per cent. as a sinking fund; and the condemnation of the right-of-way for the erection of such works shall be fully provided for."

The Supreme Court of Texas assumed, for the purposes of the Mitchel county case, that the above quoted article was applicable to the indebtedness then in question, and we shall make a like assumption in the argument of this case. Applying Sec. 7, Art. 11, to petitioner's case, the Circuit Court of Appeals held that it was essential to the validity of the bridge contract and of the bonds sued on that the County Commissioners' Court, when it made the contracts and authorized the issuance of the bonds, should have itself at that time expressly provided for the levy and collection of a sufficient tax to pay the interest thereon and to provide a sinking fund of at least two per cent., and that, as the petition of plaintiff in the court below failed to show that the County Commissioners did make such special contemporaneous provision for a sufficient tax, etc., no cause of action had been stated and the general demurrer must be sustained. The Court passed over, *sub silentio*, the effect of the special circumstance that the bonds had been issued under authority of the act of 1887, and thus held, in effect, that the requirements of Sec. 7 had not or could not be met by legislative provision for the levying and collection of a sufficient tax.

On the other hand, the Supreme Court of Texas, addressing itself to the identical questions, said: "It was

not the purpose of the convention, in adopting the foregoing articles, to require that a city or county should at the time of creating a debt ascertain the rate per cent. required to be levied upon the taxable values of the county, in order to raise a sufficient sum to pay the interest and provide a sinking fund upon that debt, and to actually levy that rate at the time." After citing authorities in support of this proposition, the Court goes on to say: "What the Constitution requires is that provision shall be made at the time, or shall have been previously made, by which the rate of tax to be levied is so definitely fixed—as was done in the case last cited—that it becomes merely a ministerial act to determine the rate to be levied. The Legislature has the power to make all such 'provision' for counties and cities, or it may leave it to the officers of such corporations to make it, when the debt is created; if made by either it is sufficient. Mitchel county has not provided for the collection of such tax, and the solution of the question now before us depends upon whether the laws under which the bonds were issued made such provisions as the Constitution required. On behalf of Mitchel county it is urged that by the terms of Sec. 7, Art. 11, of the Constitution the 'provision' which is required to be made for levying and collecting taxes with which to pay the interest and create a sinking fund upon the indebtedness of a county must be made by the officers of the county *at the time* the debt is incurred, and that the source of authority for making the levy and collecting the tax is the Constitution, and not the act of the Legislature." The Court then discusses Sec. 7, in connection with other provisions of the Constitution, and reaches the conclusion that it "contains no grant of authority to levy a tax nor designation of any official by whom the tax specified is to be levied and collected, but is in effect a limitation upon the power of the Legislature to authorize such corporations

to create debts." After citing some authorities on the interpretation of constitutions, the Court declares: "It is quite too plain for argument that if the laws of 1881 and 1884 or similar laws had never been passed, Mitchel county would have had no authority under the Constitution to contract the debts represented by the bonds nor to levy a tax for the payment of the interest and sinking fund on such debt; the power to do so could be derived from the Legislature only. It the Legislature had the power to grant authority to the county to make such provision, then that department could exercise the power itself. If the terms of the law are such that where the county has issued its bonds in compliance with it, the bondholder might resort to a Court and by *mandamus* compel the county to levy tax sufficient to pay the interest annually and to raise a sinking fund of not less than 2 per cent., then the provision would be sufficient under the Constitution. Whether less certain directions might meet the demands of the Constitution is not before us. This brings us to the consideration of the question, were the requirements of the statutes under which these bonds were issued so explicit as to constitute a compliance with the mandate of the Constitution?"

One of the bond issues, the validity of which was questioned in the Mitchel county case, was an issue of bonds for court house and jail purposes. The authority for such bonds was a statute passed in 1881. Unlike the act of 1884 and the act of 1887 (under which petitioner's bonds were issued) the act of 1881, while requiring the levy of a sufficient tax to pay the interest and create a sinking fund, did not specify the per cent. of sinking fund. The Court considered at length the question whether such a law met the constitutional requirement, and concluded that it did, inasmuch as the act must be read in connection and harmonized with the mandate of the Constitution, that a sinking fund of at least 2 per cent. must be

provided for. As the acts of 1884 and 1887 provided for a sinking fund of 4 per cent., the sufficiency of such a provision to meet the mandate of the Constitution was considered manifest. After quoting from the acts of 1881 and 1884 it was said: "The statutes quoted above were enacted by the Legislature in view of the requirements of Secs. 2 and 7, Art. 11, of the Constitution, and with the evident purpose of giving effect to the terms of those sections. As we have said before, the Legislature might have empowered the Commissioners' Court to provide for collecting the tax required by the Constitution, but it pursued, as we think, the wiser course of making the necessary provision by a general law, which applied to and governed the issuance of all bonds for the given purpose, whereby the taxpayer and the bondholder would be alike protected and uniformity secured."

The Court discussed at length, upon principle and authority, the question whether the legislative provision in the two acts were sufficient to satisfy the constitutional requirement, and held that it was. "It therefore follows," said the Court, "that it was a legal duty resting upon that Court (the Commissioners' Court), after issuing and selling the bonds under the authority given in the first section of each article, to annually levy and collect the tax necessary to raise the interest and sinking fund not less than the minimum expressed in each law and the District Court had the authority to enforce the performance of that duty by writ of mandamus, but would not control the discretion vested iu the Commissioners' Court to levy and collect a tax which would provide for a sinking fund greater than 2 per cent. We think it manifest that there was no act involved in the performance of the duty enjoined by Sec. 2 of each of the acts which required the exercise of any discretion on the part of the Commissioners' Court, but that having determined the questions upon which the issuing of the bonds de-

pended, there remained nothing to be done but to perform the ministerial act of ascertaining the sum to be collected and the rate per cent. necessary to be levied upon the taxable values of the county each year and that the performance of this duty the District Court had the authority to enforce by a writ of mandamus."

We have no concern with the other questions discussed by the Court arising out of certain irregularities in the issuance of the bonds in question, *e. g.*, loaning court house bonds to the bridge fund, etc. Suffice it to say that upon the principles and reasoning, sufficiently indicated by the above quotations from the opinion, the bridge bonds in question were declared to be valid obligations of the county.

We submit that no argument is necessary to show the legal identity of the facts and issues involved in the two cases and the contrariety of the conclusions reached by the two courts.

III.

The Supreme Court of Texas was right, and the Circuit Court of Appeals was wrong, in the construction placed by them respectively on the Constitution and status in question.

We believe that whether your Honors follow the familiar rule referred to by the Circuit Court of Appeals in its opinion in this case, that "a decision of the highest court of a State construing a provision of the State Constitution limiting the powers of counties and cities as to the creation of debts, is binding on the Federal courts," or whether you exercise an independent judgment in the matter, the result will be the same, and that is, that the construction by the Supreme Court of Texas of the Constitution and statutes concerned was right, and, hence, that the Circuit Court of Appeals erred in sustaining the demurrer and declaring illegal the issue of bonds to which petitioner's coupons belong.

We shall not attempt to fortify the opinion of the Supreme Court of Texas in the Mitchel county case; it is self-supporting. We shall content ourselves with briefly commenting upon the authorities cited in the opinion of the Circuit Court of Appeals, in order to show that they do not touch the points upon which we rely for the reversal of the decision of that court. No case was cited, and no case can be cited, where the question of the effect of a legislative provision for the levying and collection of a sufficient tax, etc., such as is made in the act of 1887, under which our bonds were issued, was presented or considered. The cases decided by the Supreme Court of Texas did not relate to bonds issued for the special purposes and under the special authority covered by Sec. 2 of Art. 11 of the Constitution and the legislation passed in compliance therewith. And in the cases from the Federal Courts the question of the sufficiency of a legislative provision for the levying of a tax as a compliance with the mandate of the Constitution was either not involved or not presented, considered or decided.

The decision in the case of Quaker City National Bank vs. Nolan County (C. C. A.), 66 F. R. 88, was very brief. The Court simply held that the Supreme Court of the State had decided that Sec. 7 of Art. 11 was applicable, and, hence, that the failure of the Commissioners' Court to itself make contemporaneous provisions for the levy of a tax was fatal to the validity of the bonds. In Millsaps vs. City of Terrell (C. C. A.), 60 F. R. 193, the Court decided that the bonds sued on were invalid because issued at a time when the city had already levied taxes to the full limit prescribed by the Constitution and pledged the same to other indebtedness, and, therefore, it was a legal impossibility to comply with the requirements of Secs. 5 and 7, Art. 11, in respect to the later bonds. Francis vs. Howard County (C. C. A.), 54 F. R. 487, was a case involving simply an overissue of bonds. The

case of Terrell vs. Dessaint, 71 Tex. 770 (9 S. W. 593), was one brought on a promissory note of the city of Terrell, for $2000, payable in two years, which contained the recital that it was given in payment for material for waterworks supplies, and was payable out of the tax of ¼ per cent. collected annually for general purposes. The note represented part of the purchase price of certain material for the extension of the waterworks of the city. As there was no contemporaneous provision made by the municipal corporation, and no previous legislative provision for the payment of this debt, and as it was not a debt for current expenses, recovery upon the note was denied. There is nothing in Terrell vs. Dessaint, or in Nolan County vs. State, 83 Tex. 183 (17 S. W. R. 823), which militates in any way against the contention made in support of the present application.

As we have stated above, the defense of the validity of the bonds which we now urge, based on the act of 1887, was urged in the Circuit Court of Appeals, both in printed and oral argument, but so convinced was the Court that the established jurisprudence of the State courts was opposed to us that our contention on this point was not discussed in the opinion. The opinion in the Mitchel county case of the Court of Civil Appeals was also filed with the court below; but, either because the Court of Civil Appeals was an inferior court or because its opinion was not supported by the unanswerable reasoning by which the Supreme Court fortified its decision, the matter was ignored in the reasons for the judgment complained of.

The case made out by the petition for a *certiorari* is, in a great measure, *sui generis*. An error has been committed by the Circuit Coart of Appeals, and recovery of an honest debt, for which defendant has received the agreed consideration, has been denied. It so happened that the means of demonstrating the error which operates such a hardship upon petitioner did not come

into existence until too late to be availed of in the court below. Your Honors have the power to grant relief. Will you allow the error and the consequent injustice to be perpetuated?

If the decision in the Mitchel county case had been rendered before the decision in this case it can not be doubted that the Circuit Court of Appeals would not have held our bonds invalid. But if it were otherwise, then there is presented here a case of conflict between the State and Federal Courts, having jurisdiction of causes in Texas, in respect to the meaning and effect of important constitutional and statutory laws of the State affecting the validity of numerous issues of municipal bonds, representing large sums of money and held by many different owners, residents and non-residents, where the effect of the construction of such laws by the Federal courts will be practically to close the doors of such courts to the holders of such bonds and to force them into the State courts for the successful enforcement of their rights. This condition of things affords another reason for the favorable consideration by your Honors of the present application.

We do not feel that anything that we can write can enlighten your Honors in respect to the nature of the relief by *certiorari* or in respect to the classes of cases to which it should be extended. The best we can do is to present clearly the peculiar facts of this case and leave the rest to the wisdom and sense of justice of this Court.

In the appendix will be found the full text of the opinion and decision in the Mitchel county case and of the acts of 1884 and 1887 discussed in this brief.

Respectfully submitted,

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APPENDIX.

OPINION OF SUPREME COURT OF TEXAS.

COUNTY OF MITCHEL *vs.* CITY NATIONAL BANK OF PADUCAH, KY. } No. 562. From Mitchel County, Second District.

The defendant in error sued Mitchel county in the District Court of that county to recover upon interest coupons alleged to have been attached to and representing the interest on certain bonds issued by the county for the purpose of building a court house and jail, and also to recover upon interest coupons alleged to have been attached to and representing the interest upon certain bonds issued by the said county for the purpose of constructing and purchasing bridges. The petition alleged in substance that Mitchel county being without a court house, on the different days therein mentioned executed and delivered to Martin, Byrne & Johnson a certain negotiable or written obligation, in which it was recited that the said bonds or obligation were issued for the erection of a court house in said county of Mitchel, each and all of them being of like tenor and effect except their dates; each bond being for the sum of $1000, and bearing interest at the rate of 7 per cent. per annum, excepting numbers 51 to 55 inclusive, which bear 8 per cent. interest from date; each of the said bonds payable fifteen years from date. It was also alleged that the said county upon the different dates therein alleged issued to bearer other bonds described in the petition, for the purpose of con-

structing and purchasing bridges for the said county, which said bonds were each for the sum of $500, payable in twenty years, bearing 8 per cent. interest from date.

It was alleged that the plaintiff was the legal and equitable owner and holder of the said bonds, and that the coupons sued upon represented the interest upon them for the several years mentioned therein, which the said county of Mitchel had failed and refused to pay, and that the said coupons had each been presented to the Commissioners' Court of Mitchel county for payment according to law, which had been refused. It was alleged in the petition that all of the said bonds were issued according to the laws of the State of Texas which authorized their issue.

The defendant filed a general demurrer to the said petition and a special exception thereto upon the ground that the petition showed that the defendant was a municipal corporation; that the alleged debt sued for is a debt not contracted for current expenses, and wholly fails to allege that at the time of the creation of the several debts evidenced by said alleged bonds and coupons the county made any provision for levying and collecting a sufficient tax to pay the interest thereon and provide at least 2 per cent. as a sinking fund to pay said indebtedness. The defendant also filed a general denial and a special plea in which the county set up the fact that no provision had been made by it for levying and collecting a tax to pay the interest and sinking fund upon the said bonds.

The District Court overruled the special exception No. 2, the substance of which is above stated, but no action appears to have been taken on the general demurrer. Trial was had before the Court, without a jury, and judgment was given for the plaintiff bank against the defendant upon the coupons representing the interest of a portion of the bonds and denied as to others, but it is not necessary here to designate the particular bonds which were sustained or those which were declared to be invalid.

The trial Court filed conclusions of fact, from which we make the following statement of the facts necessary in the consideration of the questions presented on this writ of error: On the tenth day of August, 1881, Mitchel county entered into a contract with Martin, Byrne & Johnson to build for it a court house and jail, for which the county was to pay them $33,250, the Court house to cost $21,323 and the jail $11,927. The county was to pay in its bonds, which were to bear interest at 7 per cent. per annum, the bonds to be payable in fifteen years from their date and to have coupons attached representing the interest for each year. The first payment of $10,000 in bonds was to be made upon completion of the first story of the jail and foundation of the court house. The second payment to be made of $10,000 of the bonds when the jail was completed and accepted; and the last payment, $13,250, to be made in bonds when both the court house and jail were completed.

On January 12, 1882, the county paid to the contractors $10,000 in ten bonds numbered from 1 to 10; on July 5, 1882, the county paid to the contractors ten bonds for $1000 each numbered 11 to 20 inclusive; April 25, 1883, the county paid to the contractors $10,000 in bonds numbered 21 to 30 inclusive. Of the aforesaid bonds the plaintiff owns Nos. 11 to 16 inclusive and 24 to 30 inclusive. The others are outstanding in the hands of other parties.

In 1884, the county being again without a court house issued to the same parties, Martin, Byrne & Johnson, twenty-two bonds of $1000 each numbered from 34 to 55 inclusive, which were the same in form as the first bonds issued and like them in every particular excepting the date, and that the latter bonds bear interest at 8 per cent. instead of 7. Of these last named bonds the plaintiff owns Nos. 51 to 55 inclusive. Each of the aforesaid bonds was payable to Martin, Byrne & Johnson or bearer.

At different times, as hereinafter stated, Mitchel county caused to be issued bonds numbered from 1 to 62, payable to bearer, each for the sum of $500, due twenty years from date, with 8 per cent. interest, and a coupon representing the interest for each year attached to each bond. Each of the said bonds contained the following recital: "This bond is issued for the purpose of obtaining money to buy and construct bridges for public uses within the said county of Mitchel, in pursuance of an act entitled 'An act to authorize counties to issue bonds for bridge purposes and to levy a tax to pay the same,' passed at the special session of the Eighteenth Legislature, convened at the city of Austin, Texas, January 8 and adjourned the 6th day of February, 1884." The plaintiff is the owner of these last named bonds numbered 1 to 26 inclusive, and Nos. 34, 35, 60 and 61. The plaintiff paid value for all of the bonds herein stated as belonging to it, and acquired them in the regular course of business, without notice of any defect in them, except such as the law would charge it to have upon the facts as shown upon the record of the Commissioners' Court of Mitchel county.

The Commissioners' Court of Mitchel county did not at any time make any provision for levying and collecting the tax to pay the interest upon the aforesaid bonds, or any of them, nor to raise a sinking fund for their redemption, except that for the year 1881 the Court levied a court-house and jail tax of twenty-five cents on the $100. In 1882 it levied fifty cents on the one hundred dollars for the same purpose, and since that time, until 1895, it has levied annually twenty-five cents on the one hundred dollars. For each year since the issuing of the bonds for bridge purposes the Court has levied fifteen cents on the one hundred dollars as a tax for road and bridge purposes.

The taxable values of Mitchel county were for the different years as follows: For 1881, $592,961; for 1882,

$1,155,479; for 1883, $2,250,489; for 1884, $3,118,239. And the counties attached to Mitchel county for judicial purposes had taxable values for the different years as follows: For 1881, $138,861; for 1882, $318,248; for 1883, $361,355; for 1884, $995,080.

The court found to be due upon the coupons in suit the following sums: Upon the court house bonds the sum of $1820, and upon the bridge bonds the sum of $2720. The coupons which were sued upon were all presented to the Commissioners' Court of Mitchel county, Texas, in proper form, and payment demanded, and all of them have been by said court wholly refused and disallowed.

On February 11, 1884, the Commissioners' Court of Mitchel county made the following order, which was duly entered upon the minutes of that court: "Ordered that bonds of Mitchel county, to the amount of ten thousand dollars, issue and be set apart for the building and improving of bridges, and for opening and improving public roads of said county, said bonds to bear 8 per cent. interest and to run to the extent of the law, and to be taken up as the exigencies of the county demands." On June 3, 1884, bonds numbered 1 to 6 inclusive were issued under this order. May, 27, 1884, the Commissioners' Court ordered that a bond for $500 issue in favor of W. L. Pendleton, contractor for building bridges, etc. The clerk issued to Pendleton bond No. 9. August 13, 1884, the said court directed bonds for $100 ($1000) to to be delivered to Mahoney & Evans, bridge builders, on their contract for $5800, and two bonds numbered 7 and 8 were delivered to them August 16, 1884. August 13, 1884, the Commissioners' Court directed the clerk to issue bridge bonds to Mahoney & Evans for the balance due them on their contract, and the clerk issued five bonds and delivered them to the contractors, being Nos. 14 to 18 inclusive.

On August 28, 1884, the Commissioners' Court entered

the following order: "That a special fund be established as the cash fund, which shall be set apart for the purpose of meeting any demands against the county that must necessarily be paid in cash; and that the clerk of this county issue four bonds on the road and bridge fund for the sum of $500 each, to run twenty years, with interest at 8 per cent. per annum, said bonds to be sold and the fund transferred from the road and bridge fund to the cash fund." Four bonds were issued, being Nos. 10 to 13 inclusive, under the first order copied herein, and on January 12, 1885, two bonds were issued to pay for repairing bridges, being Nos. 19 and 20, which exhausted the order for the issuing of $10,000 of bonds.

We copy from the findings of the trial court as follows:

"On February 13, 1885, it was ordered by the court that, instead of issuing scrip on the general fund to cover the amount of Martin, Byrne & Johnson's note, that same be paid out of money resulting from the sale of bridge bonds. And that the clerk is ordered to issue six bridge bonds of $500 each, and deliver the same to Wm. Martin, who is authorized to make sale of said bonds, and after deducting the amount of his note, with interest thereon, to pay the remainder into the treasury to the credit of the road and bridge fund.' Under this order bonds, numbered from 21 to 26 inclusive, were issued the 13th of February, 1885.

"On May 14, 1885, the Court made an order 'that road and bridge bonds be issued to Martin, Byrne & Johnson for the balance due on the new court house when it can be ascertained what said amount of balance is after paying on said house all available cash that can be used for paying for same,' and on the same day by order of the Court E. F. Swinney was appointed financial agent of the county to sell bonds so issued.

"On June 25, 1885, the Court made the following order, viz.: 'It is hereby made an order of this Court that the

road and bridge bonds ordered issued at a previous term of this Court be issued and sold as directed in the minutes of that meeting. And it is further ordered to be recorded that the sum of money represented in and by the bonds to be issued, and the same is made a loan from the road and bridge fund to the court house and jail fund, there being an excess of unexpended bonds in said road and bridge fund, and that the same be paid back to the road and bridge fund as it accumulates in the court house and jail fund from the collection of taxes in that fund. And it is made a part of this order that the sum of $15,000 in road and bridge bonds, the same being thirty bonds of $500 each, be issued and sold as the law directs; that is at not less than par value; the contractors to receive what cash there is now in the county treasury belonging to the court house and jail fund, the sum of $1306.56, and to be paid by an order of this Court the sum of money yet uncollected as taxes in the court house and jail fund on the tax roll to be collected this fiscal year, amounting, probably, to $1900. This last payment to be made only after deducting all legal offsets claimed by the county in the way of rents, unfinished work on the court house, reservations in the contract as to delay in its completion, etc.; the same to be ascertained by the Commissioners' Court at a regular meeting when there is a full board present. Upon this order on June 27, 1885, thirty bridge bonds were issued, numbered from 33 to 62, inclusive.

"On August 14, 1885, there was an order of the Court that the clerk issue a warrant on the court house and jail fund in favor of Martin, Byrne & Johnson for the sum of $16,892.11, balance due on the new court house. And ordering the treasurer to collect of E. F. Swinney, financial agent, the sum of $14,925, the amount for which said bonds were sold, less $75 commission allowed him, and that the same be paid on the said warrant."

This suit was instituted by the defendant in error against

Mitchel county to recover of it the amounts specified in the several coupons described in the petition, which represent the interest that had accrued upon the bonds of the said county which defendant in error claims to own. The plaintiff in error contends that the bonds are void, because at the time the debt was created no provision was made by the county for levying and collecting a tax to pay the interest and to provide a sinking fund, as required by the following section of the Constitution: "All counties and cities bordering on the coast of the Gulf of Mexico are hereby authorized, upon a vote of two-thirds of the taxpayers therein (to be ascertained as may be provided by law), to levy and collect such tax for construction of sea walls, breakwaters or sanitary purposes as may be authorized by law, and may create a debt for such works and issue bonds in evidence thereof. But no debt for any purpose shall ever be incurred, in any manner, by any city or county unless provision is made, at the time of creating the same, for levying and collecting a sufficient tax to pay the interest thereon, and provide at least 2 per cent. as a sinking fund; and the condemnation of the right of way for the erection of such works shall be fully provided for" (Art. 11, Sec. 7). The defendant in error claims that the article quoted does not apply to counties other than coast counties. Without deciding that question, we will examine the case under the assumption that the article of the Constitution applies to all counties, and that the Legislature so regarded it in enacting the laws under which the bonds in question were issued.

It was not the purpose of the convention in adopting the foregoing article to require that a city or county should at the time of creating a debt ascertain the *rate per cent.* required to be levied upon the taxable values of the county in order to raise a sufficient sum to pay the interest and provide a sinking fund upon that debt and to actually levy that rate of tax at the time (Bassett vs. El Paso, 88 Tex.

175). In the case cited the city of El Paso had at the time that it determined to issue its bonds, by an ordinance, provided for the collection annually of a given sum for the purpose of paying the interest which might accrue upon the said bonds, and also a given sum to be raised annually as a sinking fund. This Court said: "The language and purpose of these provisions (of the Constitution) seem to be satisfied by an order providing for the annual collection by taxation of a sufficient sum to pay the interest thereon and create a sinking fund, etc., though it does not fix the rate or per cent. of taxation for each year by which such sum is to be collected, but leaves the fixing of such rate for each successive year to the Commissioners' Court or City Council. * * *

"As stated above, we have not deemed it necessary to determine whether the order of August 11, 1893, actually levied a tax, as we are of the opinion that it fully complied with the law by making provision for the collection of the interest and sinking fund by taxation."

What the Constitution requires is that *provision* shall be made at the time, *or shall have been previously made*, by which the rate of tax to be levied is so definitely fixed—as was done in the case last cited—that it becomes merely a ministerial act to determine the rate to be levied. The *Legislature* has the power to make all such "provision" for counties and cities, or it may leave it to officers of such corporation to make it when the debt is created; if made by either it is sufficient. Mitchel county has not provided for the collection of such tax, and the solution of the question now before us depends upon whether the laws under which the bonds were issued made such "provision" as the Constitution required.

On behalf of Mitchel county it is urged that by the terms of Sec. 7, Art 11, of the Constitution, the "provision" which is required to be made for levying and collecting taxes with which to pay the interest and create a

sinking fund upon the indebtedness of a county must be made by the officers of the county *at the time* the debt is incurred and that the source of authority for making the levy and collecting the tax is the Constitution and not the act of the Legislature. The only parts of the Constitution which bear upon this subject are Sec. 9 of Art. 8, and Secs. 2 and 7 of Art. 11. Section 9 confers no authority upon any officer of a city or county to levy a tax for any purpose, but by the language "no county, city or town shall levy more than one-half of said State tax * * * and for the erection of public buildings not to exceed fifty cents on the one hundred dollars in any one year," places a prohibition or limitation upon the power of the Legislature to authorize counties to impose taxes for such purposes. Section 2 of Art. 11 expressly requires the enactment of a general law to carry its mandates into effect, and Sec. 7 of the same article contains no grant of authority to levy a tax nor designation of any official by whom the tax specified is to be levied and collected, but is in effect a limitation upon the power of the Legislature to authorize such corporations to create debts. In the sense that all laws in conflict with these prohibitions are void, Sec. 9, Art. 8, and Sec. 7, Art. 11, are self-executing, but in so far as anything is required to be done to carry them into effect they are not so, because they prescribe no rules by which any act could be done in the enforcement of their requirements. In his work on Constitutional Limitation, p. 100, Mr. Cooley says: "A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which these principles may be given the force of law." It is quite too plain for argument that if the laws of 1881 and 1884 or similar laws had never been

passed, Mitchel county would have had no authority under the Constitution to contract the debts represented by the bonds nor to levy a tax for the payment of the interest and sinking fund on such debt; the power to do so could be derived from the Legislature only. If the Legislature had the power to grant authority to the county to make such provisions, then that department could exercise the power itself.

If the terms of the law are such that when the county has issued its bonds in compliance with it, the bondholder might resort to a court and by mandamus compel the county to levy a tax sufficient to pay the interest annually and to raise a sinking fund of not less than 2 per cent., then the provision would be sufficient under the Constitution. Whether less certain directions might meet the demands of the Constitution is not before us. This brings us to the consideration of the question, were the requirements of the statutes under which these bonds were issued so explicit as to constitute a compliance with the mandate of the Constitution?

The bonds known as court house bonds were issued under an act of the Legislature approved February 11, A. D. 1881, Sections 1 and 2 of which read as follows:

"SECTION 1. That the County Commissioners' Court of any county which has no court house at the county seat is hereby authorized and empowered to issue the bonds of said county, with interest coupons attached, in such amounts as may be necessary to erect a suitable building for a court house; said bonds running not exceeding fifteen years, and redeemable at the pleasure of the county, and bearing interest at a rate not exceeding 8 per cent. per annum.

"SEC. 2. The Commissioners' Court of the county shall levy an annual *ad valorem* tax on the property in said county sufficient to pay the interest, and create a sinking fund for the redemption of said bonds, not to ex-

ceed one-fourth of 1 per cent. for any one year." (Gen. Laws 1881, p. 5.)

The bridge bonds were issued under an act of the eighteenth legislature, special session, 1884, the first and second sections of which read as follows:

"SEC. 1. That the County Commissioners' Courts of the several counties of the State are hereby authorized and empowered to issue the bonds of said county, with interest coupons attached, for such amounts as may be necessary for the purpose of buying or constructing bridges for public uses within such county, said bonds to run not exceeding twenty years and bear interest at any rate not to exceed 8 per cent. per annum.

"SEC. 2. The Commissioners' Court shall levy an annual *ad valorem* tax not to exceed fifteen cents on the one hundred dollars valuation, sufficient to pay the interest on, and create a sinking fund for the redemption of said bonds. The sinking fund herein provided for shall not be less than 4 per cent. on the full sum for which the bonds are issued. (Gen. Laws, special session, 1884, pp. 29-30.)

The statutes quoted above were enacted by the Legislature in view of the requirements of Secs. 2 and 7, Art. 11 of the Constitution, and with the evident purpose of giving effect to the terms of those sections. As we said before, the Legislature might have empowered the Commissioners' Court to provide for collecting the tax required by the Constitution, but it pursued, as we think, the wiser course of making the necessary provision by a general law, which applied to and governed the issuance of all bonds for the given purpose, whereby the taxpayer and the bondholder would be alike protected and uniformity secured.

Under such system the purchaser of bonds could easily ascertain the extent to which the taxing power of a county had been appropriated and by looking to the taxable

values of the county could form a just estimate of the worth of such securities, which we think would greatly tend to enhance their market value. Taxpayers would be furnished the means of learning the manner in which their finances had been managed by those to whom they had entrusted the business of the county, and in case such officers sought re-election could easily call them to account for any failure in the discharge of their duties. The effect of legislation would be to compel a county to keep its indebtedness within the limits of its present power of taxation instead of piling up a debt which would absorb the future revenues of the county.

Counsel for defendant in error in their briefs and printed argument, as well as in an able argument before the Court, contend that by enactment of Sec. 2 of the act of 1881, the Legislature intended to require of the Commissioners' Court to levy and collect a sinking fund sufficient to discharge the bonds at maturity, and that since the bonds could not run for a greater time than fifteen years, the sinking fund must necessarily exceed 2 per cent., and thus the Constitution would be complied with. The position is plausible, but we are of opinion that the Legislature intended by the use of the words "and create a sinking fund for the redemption of said bonds not to exceed one-fourth of 1 per cent. in any one year," to fix the minimum sinking fund at the rate prescribed by the Constitution and to limit the maximum by that amount, which could be raised from a tax of one-fourth of 1 per cent. Section 7 of Art. 11 of the Constitution, by prohibiting the creation of a debt unless provision was made for creating a sinking fund of at least 2 per cent., thereby prescribed that the sinking fund should not be less than the rate per cent. named, and the Legislature could not therefore fix a rate nor authorize the Commissioners' Court to fix a rate less than that prescribed by the Constitution.

If, as claimed by the plaintiff in error, Sec. 7 of Art.

11 of the Constitution applies to all counties and cities in the State (which we assume in this discussion), then every law enacted by the Legislature which authorizes the creation of a debt by cities or counties must conform to the requirements of that section or it will be invalid. In other words, a law which authorized the creation of a debt by a city and county and did not provide for, or authorize the municipal authorities to provide for, levying and collecting a tax sufficient to pay the interest on such debt and create a sinking fund of at least 2 per cent. for its payment would be void. We understand that the provision required by the Constitution means such fixed and definite arrangements for the levying and collecting of such tax as would become a legal right in favor of the holders of bonds issued thereon or in favor of any person to whom such debt might be payable. It is not sufficient that the municipal authorities should by the law be authorized to levy and collect a tax sufficient to produce a sinking fund greater than 2 per cent., but to comply with the Constitution the law must itself provide for a sinking fund not less than 2 per cent., or require of the municipal authorities to levy and collect a tax sufficient to produce the minimum prescribed by the Constitution.

The laws of 1881 and 1884 being enacted by the Legislature in pursuance of and for the purpose of putting into force the constitutional provisions before cited, it is the duty of the courts to so construe the terms of the laws as to make them valid and to give effect to them. Under Sec. 7, Art. 11, the Legislature could not have empowered the Commissioners' Court to create a sinking fund of less than 2 per cent., and as the Commissioners' Court could not, under the law and the Constitution, have fixed a sinking fund at less than that rate, we must construe the language used in the act of 1881, Sec. 2, which commands the Commissioners' Court to levy and collect a sinking fund for the redemption of the bonds,

o mean a sinking fund of not less than 2 per cent., as defined and limited by the Constitution. (G. B. & C. N. G. Ry. Co. vs. Gross, 47 Texas, 428; McKenzie vs. Baker, 88 Texas, 677; Rosenberg vs. Meeks, 67 Texas, 579; U. S. vs. Coombs, 12 Peters, 72; Grenada County vs. Brown, 112 U. S. 261; Bailey vs. Phila. & Baltimore R. Co., 4 Harrington, 389; 44 Am. Dec., 593; Duncomb vs. Prindle, 12 Iowa, 1; Millay vs. White, 86 Ky. 170; Temmick vs. Owings, 70 Md., 246; Marshall vs. Grimes, 41 Miss. 27; Bigelow vs. Wis. R. R. Co., 37 Wis. 578; McWigan vs. Railroad Co., 95 N. C. 429; Nolan County vs. State, 83 Texas, 195.) In case of G. B. & C. N. G. R. W. Co. vs. Gross, above cited, the railroad company brought suit against Gross, the commissioner of the land office, to compel him to issue to the railroad company certificates for lands which might be located singly, as in the case of headright certificate. The charter of the railroad company was enacted on the second day of February, 1875, and provided: "Whenever any section of five miles of said road has been completed the said company, through its president and secretary, may give notice of the same to the Governor of this State, in writing, whose duty it shall be, on receipt of such notice, to order the State engineer, if there be any, or if there be none, then to appoint a skilful engineer to examine the said section of road and report under oath; and if said section of five miles of said road be found to be constructed and in running order, in substantial manner, then the Governor shall certify the same to the commissioner of the general land office, and he shall issue to the said company sixteen land certificates, of six hundred and forty acres each, for each and every mile of road so constructed and put in running order, and in like manner with each and every sueceeding five miles of said road, until the whole has been completed." In 1876 the Governor gave his certificate in the manner

required by law, and the railroad company applied to the commissioner of the general land office for eighty land certificates for six hundred and forty acres each, such as might be located and surveyed in single sections, which the commissioner refused to issue, but proposed to issue certificates conditioned so as to require each certificate to be located upon two tracts of six hundred and forty acres each, one for the railway company, the other for the public school fund. The railroad company refused to accept these certificates, and brought suit to obtain a writ of mandamus against the commissioner compelling him to issue the certificates as demanded. On March 18, 1873, the Legislature passed an act by which it set apart to the public-school fund one-half of the public domain, and prescribed "that all land certificates heretofore issued to any railroad company or other corporation of any nature whatever for internal improvements or for any other object, or any lands hereafter granted in any manner to any of said corporations or companies for any such object shall be located and surveyed in alternate sections of 640 acres each, as directed by an act entitled 'An act to encourage the construction of railroads in Texas by donations of land,' approved January 30, 1854." The charter of the railroad company was enacted subsequently to the last above cited act of the Legislature, and the question before the Court was whether the grant of the certificates therein should be construed so as to give effect to the law of 1873. In discussing the question this Court said: "At the time the appellant's charter was granted we hold that there was in force a general law which required the certificates to railroads to be in alternate sections, which certificates may be located and patented on any of the public domain of this State according to the general law on the principle of alternate sections. * * * We think that the act incorporating this railroad company was passed with reference to the system of locating and surveying railroad certificates

which had long been in force, and that it was the legislative intent to conform to that system and thereby preserve uniformity in the amount and character of bounty extended." And the Court held that the language of the charter must be construed as if it provided for the issuing to the railroad company of certificates to be located in alternate sections, as required in the general law.

In 1860 the Legislature of the State of Mississippi enacted a law whereby certain counties of the State might subscribe to the capital stock of a railroad company upon a vote of the majority of the legal voters of the county. In 1871 the Legislature of that State so amended the law of 1860 as to include in its terms the county of Grenada. In the bill amending the former law it was provided that elections upon the subject of issuing bonds in aid of railroads should be held in accordance with the law of which that was amendatory and in accordance with the provisions of the Constitution of the State. In 1869, after the enactment of the original law, that State adopted a Constitution in which was a provision forbidding the Legislature to pass any law authorizing a county to subscribe for stock in a railroad unless it was assented to by two-thirds of the qualified voters of that county. The county of Grenada, upon a two-thirds vote of its qualified voters, subscribed for $50,000 of the capital stock of a railroad company, issuing bonds therefor, and, being sued upon the bonds, defended the action upon the ground that the law under which they were issued was void, because it authorized their issue upon a majority instead of a two-thirds vote, as required by the Constitution. There was a direct conflict between the language of the act of the Legislature and the Constitution, except that the amendatory act prescribed that the election should be held in accordance with the Constitution. The Supreme Court of the United States, in the case of Grenada County vs. Brown, 112 U. S. 261, construed the statute to mean that

a two-thirds vote was required in order to issue the bonds, and, thereby, made the act conform to and harmonize with the Constitution of the State, and with the policy of the State upon this subject. That Court said: "It certainly can not be said that a different construction is required by the obvious import of the words of the statute. But if there were room for two constructions, both equally obvious and reasonable, the Court must, in deference to the Legislature of the State, assume that it did not overlook the provisions of the Constitution and designed the act of 1871 to take effect. Our duty, therefore, is to adopt that construction which, without doing violence to the fair meaning of the words used, brings the statute into harmony with the provisions of the Constitution."

Article 4861 of the Revised Statutes reads as follows: "No Court of this State shall have power, authority or jurisdiction to issue the writ of *mandamus*, or injunction, or any other mandatory or compulsory writ of process against any of the officers of the executive departments of the government of this State, to order or compel the performance of any act or duty which, by the laws of this State, they or either of them are authorized to perform, whether such act or duty be judicial, ministerial or discretionary."

And Art. 946 is in the following language: "The Supreme Court, or any justice thereof, shall have power to issue writs of *habeas corpus* as may be prescribed by law; and the said Court, or the justices thereof, may issue writs of *mandamus*, *procedendo*, *certiorari* and all writs necessary to enforce the jurisdiction of said Court; and in term time or vacation may issue writs of *quo warranto* or *mandamus* against any district judge or officer of the State government, except the Governor of the State."

In McKenzie vs. Baker, 88 Texas, 677, the question was made that Art. 4861 forbids that any court in this State should issue a *mandamus* against the heads of the

departments of the State government, and that therefore the Court had no jurisdiction to grant the writ prayed for. The question before the Court was, which of these articles should yield, if they could not be so construed that both could stand, and Judge Gaines, for the Court, said: "The rule is that where a general intention is expressed, and the act expresses also a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception. This is no arbitrary canon of construction, but is a rule founded upon experience and sound reason. It follows from this rule that Art. 4861 should be construed to read: 'No court in this State except the Supreme Court shall have power,' etc. This construction preserves both articles, and that construction should always be avoided by which any provision of the statute would fail altogether." It will be observed that the Court decided that Art. 946 should stand in preference to the other article, if one must yield, and in order that both might be preserved and given effect to, the language of Art. 4861 was construed so as to embrace an exception understood but not expressed.

In Nolan County vs. State, 83 Texas, 195, the Court had under consideration Sec. 3 of the act now under examination, which is in these words: "The county shall not issue a larger number of bonds than a tax of one-fourth of 1 per cent. annually will liquidate in ten years, and such bonds shall be sold only at their face or par value." Independent of the Constitution the language quoted committed to the Commissioners' Court the power to determine what amount of bonds could be liquidated in ten years by a tax of one-fourth of 1 per cent., but the Court held that this section must be construed in connection with the constitutional limitation contained in original Sec. 9, Art. 8 of the Constitution, which reads: "The State tax on property, exclusive of the tax neces-

sary to pay the public debt, shall never exceed fifty cents on the one hundred dollars valuation; and no county, city or town shall levy more than one-half of said State tax, except for the payment of debts already incurred, and for the erection of public buildings, not to exceed fifty cents on the one hundred dollars in any one year, and except as in this Constitution is otherwise provided." (Const. 1876.) Judge Gaines, for the Court, said: "If our Constitution were silent upon this subject, then it might be reasonably held that Sec. 3 of the statute quoted above authorized the Commissioners' Court to determine the question as to the amount of bonds 'a tax of one-fourth of 1 per cent. annually will liquidate in ten years.' But there being a provision in the Constitution bearing directly upon that subject, we are of the opinion that this section must be construed in connection with it. The limit of the Constitution being an amount upon which a tax of one-half of 1 per cent. would pay annually the interest and 2 per cent. as a sinking fund, and the statutory requirements being such an amount only as one-fourth of 1 per cent. would liquidate in a period of ten years, it was not absolutely necessary that the commissioners should be governed by the same rule in determining the two limits. An amount of indebtedness that would be liquidated within ten years, though based upon a valuation in excess of that shown by the assessment rolls, might still be within the constitutional limit, which permits the creation of such a debt as will be ultimately paid by an annual tax of one-half of 1 per cent. upon the taxable values of the county as shown by the official assessment. But we think it more reasonable to presume that the Legislature intended that the same rule should govern in determining both limits, and that the Commissioners' Court should not look beyond the assessment rolls in ascertaining the amount of the indebtedness which the statute authorizes them to create." Section 3 of the same act, of which we are considering

Sec. 2, was construed by this Court as if it read: "The county shall not issue a larger number of bonds than a tax of one-fourth of 1 per cent. on the taxable values as shown by the tax rolls of the county will liquidate in ten years"

We conclude that Sec. 2 of the act of 1881 authorizing the issuance of court house bonds should be read as if the words of the Constitution had been introduced into the act itself—that is, as follows: "The Commissioners' Court of the county shall levy an annual *ad valorem* tax on the property in the said county sufficient to pay the interest and create a sinking fund of not less than 2 per cent. for the redemption of the said bonds, not to exceed one-fourth of 1 per cent. for any one year."

So reading Sec. 2 of the law of 1881, both acts under which the bonds in question were issued are practically the same so far as the question of their compliance or non-compliance with the Constitution is concerned; and we now come to inquire whether those laws make such provision for the levying and collecting of a tax to pay the interest on the bonds issued thereunder and to create a sinking fund for their redemption as is required by Sec. 7, Art. 11 of the Constitution.

If the District Court of Mitchel county could, upon a proper showing of the facts, have required the Commissioners' court of that county to levy and collect a sufficient tax to pay the interest upon the bonds and create a sinking fund of not less than 2 per cent. per annum, and could have enforced that requirement by a writ of *mandamus*, then the provision made by the statutes is a sufficient compliance with the Constitution and the bonds so far as that question affects them would be valid. For the purpose of testing the sufficiency of those statutes in this particular, we will examine them in reference to their application to the court house bonds involved in this litigation.

There being no court house in the county of Mitchel,

the Commissioners' Court of that county was by law vested with the discretionary power to determine the following questions with reference to making the improvement needed: (1) Whether it would build a court house or not; (2) what the cost of the building should be; (3) whether the building should be paid for by the sale of bonds or otherwise; (4) if by selling bonds, then at what time the bonds should mature and the rate of interest they should bear; (5) what sinking fund exceeding 2 per cent., if any, should be provided within the limits of the law. That court exercised the discretion vested in it upon all matters above named except the sinking fund. No per cent for sinking fund has been named by the Court, and we must examine the question upon the basis that the minimum expressed in the law is to govern as to the sinking fund to be provided for by the levy of taxes. In order to simplify the matter we will consider the first ten thousand dollars in bonds issued in 1882 as if they constituted the entire series of bonds issued for the purpose of building a court house, for the reason that this issue was alone based upon the assessment of values for the county for the year 1881, and we can more readily apply the principles which are to govern in the determination of this question by thus limiting the inquiry than we could by pursuing the examination through all the various issues of the different classes of bonds.

The tax rolls of Mitchel county for the year 1881 showed the taxable values of that county to be $592,961. The Commissioners' Court of the county determined to build a court house, for which purpose bonds payable at fifteen years from date, to bear 7 per cent. interest per annum, to the amount of $10,000, were issued and sold by the county. We have here stated the data from which, by a simple calculation, we can arrive at the sum to be collected each year for the purpose of paying the interest upon the bonds and provide a sinking fund for their re-

demption. Two per cent. on ten thousand dollars would give two hundred dollars annually as the sinking fund to be collected, and 7 per cent. on that sum would yield seven hundred dollars necessary to be collected as interest, aggregating nine hundred dollars to be raised the first year to pay interest and sinking fund upon a taxable value of $592,961, which would require a levy of a fraction more than fifteen cents on the one hundred dollars of taxable values. The Commissioners' Court in fact levied twenty-five cents on the one hundred dollars of values for the first year, and continued to levy that rate per cent. for each subsequent year up to 1895. In order to test the question that we have suggested—that is, did there remain anything to be done by the Commissioners' Court which involved the exercise of discretion, let us suppose that Court had refused to levy the tax after the bonds were issued and sold, and that the bondholders, upon a proper showing, applied to the District Court for a writ of *mandamus* to compel the Commissioners' Court of Mitchel county to levy a tax sufficient to raise the interest and sinking fund at the rate prescribed as the minimum.

What answer could the Commissioners' Court of that county have made to such an application? As we have before shown, the act of issuing the bonds necessarily determined every fact involved in making provision for the interest and sinking fund, except the taxable values of the county, which was a matter of record and shown by the tax rolls by which the Commissioners' Court must be governed. What remained to be done that might be done by one person or Court in a manner different from that in which another person or Court might perform the same act? It may be answered, that the Commissioners' Court had the discretion to fix any rate of sinking fund not less than 2 per cent., which would not make the taxes for any one year exceed 25 cents on the $100, and that this was a matter of discretion. That is true, but that Court had

not the discretion to provide for no sinking fund, nor had it the discretion to provide for a sinking fund less than 2 per cent. It therefore follows, that it was a legal duty resting upon that Court, after issuing and selling the bonds under the authority given in the first section of each act, to annually levy and collect the tax necessary to raise the interest and sinking fund not less than the minimum expressed in each law, and the District Court had the authority to enforce the performance of that duty by writ of *mandamus*, but would not control the discretion vested in the Commissioners' Court to levy and collect a tax which would provide for a sinking fund greater than 2 per cent.

We think it manifest that there was no act involved in the performance of the duty enjoined by Sec. 2 of each of the acts which required the exercise of any discretion on the part of the Commissioners' Court; but that having determined the questions upon which the issuing of the bonds depended, there remained nothing to be done but to perform the ministerial act of ascertaining the sum to be collected and the rate per cent. necessary to be levied upon the taxable values of the county each year, and that the performance of this duty the District Court had the authority to enforce by a writ of *mandamus* (De Poyster vs. Baker, 89 Texas, 155; Commissioner General Land Office vs. Smith, 5 Texas, 471; Coy vs. City Council of Lyons, 17 Iowa, 1; 85 Am Dec. 539; Manor vs. McCall, 5 Ga. 522; Tarver vs. Tallapoosa, 17 Ala. 527; Stevenson vs. Summit, 35 Iowa, 462).

The plaintiff in error insists that Nos. 10, 11, 12, 13, 21, 22, 23, 24, 25, 26, 34, 35, 36, 37, 60 and 61 of the bridge bonds are void because they were issued for a purpose not authorized by law, and that the defendant in error is chargeable with notice of the facts which appear upon the record of the Commissioners' Court in reference thereto. The Court of Civil Appeals held that the bonds were

valid in the hands of the defendant in error, because it acquired them in the course of business for a valuable consideration before maturity and without actual notice of such defects, and because each of the said bonds contained a recital that it was issued "for the purpose of obtaining money to buy and construct bridges for public use within the county of Mitchel, in pursuance of an act entitled 'An act to authorize counties to issue bonds for bridge purposes and to levy a tax to pay the same,'" etc. The Court of Civil Appeals said: "We do not think under the circumstances stated that the purchaser was required to examine the orders of the Commissioners' Court for the purpose of testing their validity," and in support of that position cited and quoted from Nolan County vs. The State, 83 Texas, 194.

In that case the bonds in question were issued under an order which upon its face showed that the purpose was to build a court house for Nolan county, but some of the bonds were in fact intended at the time to be and were afterward applied to the payment of a debt contracted by the county in construction of a jail, for which latter purpose the law did not at that time authorize the county to issue bonds. Each of the bonds contained the recital that it was issued for the purpose of building a court house, under the act of February 11, 1881, giving the title of the act. This Court, through Judge Gaines, said: "If a purchaser were bound to inquire of the existence of the facts which empowered the Court to issue bonds to build a court house and to know that the county had no court house, in view of the recitals upon the face of the obligation, he was bound to look no further. He had the right to rely upon the truth of such recitals; having paid value for the bonds without actual knowledge of their illegality, the county will be estopped to set up that they were not issued for the purpose for which they purported to be issued." Taking that part

quoted by the Court of Civil Appeals from the opinion, disconnected from what precedes it, the conclusion of the Court of Civil Appeals might be reached; but considered in connection with the preceding sentence and with the facts upon which the opinion was based, it is apparent that the Court did not intend to hold that the purchaser would not be chargeable with notice of what appears on the face of the order under which such bonds were issued. The facts recited, and of which the Court was treating, were such as the Commissioners' Court must determine, and which would not appear of record, except, as stated by the Court, upon the record or in the bonds. The scope of that part of the opinion quoted by the Court of Civil Appeals is shown by the following extract from the same opinion: "If, instead of being limited to the amount of taxable property as shown by the assessor's rolls, the Constitution had conferred upon the Commissioners' Court the power of determining that question for themselves, then, according to the rule laid down in Marcy vs. Oswego, *supra*, and recognized in the case of the Citizens Bank vs. Terrell, *supra*, their determination of the amount would have been conclusive, and would have precluded inquiry into the power to issue the bonds in so far as the question of amount is concerned. But the power being limited as to the amount by the official assessment, the commissioners were not authorized to look beyond it and to determine the extent of their power from other data within their reach. In such a case the rule established in Dixon County vs. Field, 111 United States, 94, and acted upon in The Citizens Bank vs. Terrell, applies." The Court was here treating of a fact of record and announced the rule applicable to the facts of this case. The Commissioners' Court can only authorize the issue of bonds by order entered of record. (Ball, Hutchins & Co. vs. Presidio County, 88 Texas, 64.) The Commissioners' Court of Mitchel county entered an order on

its minutes on February 11, 1884, to the effect that bonds to the amount of $10,000 should be issued for the purpose of building and improving bridges and for opening and improving public roads of the said county, said bonds to bear 8 per cent. interest and to run to the extent of the law, which was twenty years. On the twenty-eighth day of August, 1884, the Commissioners' Court made an order which was entered on its minutes, "that a special fund be established as the cash fund, which shall be set apart for the purpose of meeting any demands against the county that must necessarily be paid in cash;" and directed the clerk of that Court to issue four bonds upon the bridge fund for the sum of $5000 each to run twenty years with 8 per cent. interest, to be sold and the funds transferred to the cash fund. In accordance with this direction, the clerk issued bonds Nos. 10, 11, 12, and 13, under the order of February 11, 1884, which were sold and the funds used as directed. It is contended by the county that the purchaser of these four bonds was required to take notice of the order directing the clerk to issue them and prescribing the disposition of the proceeds. But we consider the latter order as simply a direction to the officer of the county as to the manner in which the bonds should be disposed of and the funds applied; that it does not constitute the source of power or authority for issuing the bonds and the purchaser was not required to know the contents of that order. DeVoss vs. City of Richmond, 18 Gratt. 338.

But the facts are very different as to the other bonds in question. The order above quoted, which authorized the issue of bridge bonds, was exhausted by the issue of the bonds numbered from 1 to 20, each bond being for $500; the twenty bonds make the full sum of $10,000 authorized by that order. The bonds from 21 to 26 inclusive were issued under the subsequent orders of the Commissioners' Court, upon the face of which was expressed

a purpose to use the bonds in the liquidation of the court house debt and other debts contracted by the county. On February 13, 1885, the Court made an order that Martin, Byrne & Johnson be paid out of the bridge fund to be created by the sale of six bonds of $500 each, which were to be delivered to William Martin to make sale of them and pay the note due to the firm, paying the balance into the treasury; under which order the six bonds numbered 21 to 26 inclusive were issued. On May 14, 1885, the Court made an order that bridge bonds be issued to Martin, Byrne & Johnson, for the balance due them on the court house, when the amount can be ascertained, and subsequently, on June 25 of the same year, the court made another order that the road and bridge bonds ordered to be issued at a previous term of this Court be issued and sold as directed in the minutes of that meeting. This evidently refers to the order of May 14, 1885, which directed that E. F. Swinney should sell the bonds. In the order of June 25, 1885, the Court directed that thirty bonds for $500 each, being $15,000, be issued and sold as the law directs, for the purpose of raising a fund to pay off and discharge the balance due to Martin, Byrne & Johnson, on the court house contract. Bridge bonds Nos. 34 to 37 inclusive, and 60 and 61, were issued under this order.

From this state of facts it is evident that any person desiring to know the authority by which the bonds in question were issued, and looking to the orders upon the minutes of the Court under which the issue was made, could not fail to see that the county commissioners had undertaken to evade the law by issuing road and bridge bonds for the purpose of constructing a court house. This they could not do by law, and the bonds if in the hands of Martin, Byrne & Johnson would undoubt-

edly be void. The only question with regard to these bonds is, was the defendant in error, or any other purchaser for value, without actual notice chargeable with a knowledge of the facts which might be ascertained by the exercise of proper diligence and inquiry in the examination of the orders under which the bonds in question were issued? We think that this question has been settled definitely by the decision of this Court in the case of Ball, Hutchins & Co. vs. Presidio County, 88 Tex. 60, in which Judge Denman, for the Court, used the following language: "It results from what has been said above that the law requires a dealer in county bonds to know the provisions of the act of the Legislature and the order of the County Commissioners' Court, under and by virtue of which such bonds were issued, whether referred to on the face of the bonds or not." As above stated, an examination of the orders under which and by virtue of which alone the bonds could have been issued, the purchaser would necessarily have learned that the bonds were issued for a purpose not authorized by law, and being so notified would have received them with only the rights of the original payee. Having failed to take the precaution to examine the order upon which the bonds were based, the purchaser was guilty of negligence and must be charged with notice of that which could have been learned in the exercise of ordinary care.

We, therefore, conclude that the bridge bonds from 21 to 26 inclusive, and 34 to 37 inclusive, and 60 and 61 were invalid, that the plaintiff below had no right to recover against Mitchel county upon the coupons representing interest upon such bonds, and that the trial court and Court of Civil Appeals erred in holding said bonds to be valid, and in rendering judgment upon such coupons. All other bonds involved in this cause are found to be valid obligations of Mitchel county.

It is ordered that the judgments of the District Court and Court of Civil Appeals be reversed and this cause be remanded to the District Court.

T. J. BROWN,
Associate Justice.

Opinion delivered January 10, 1898.

CLERK'S OFFICE—SUPREME COURT.

I, Chas. S. Morse, Clerk of the Supreme Court of Texas, hereby certify that the above and foregoing twenty-five pages contain a true and correct copy of the opinion of the Supreme Court in cause No. 562, entitled County of Mitchel vs. City National Bank, Paducah, Kentucky.

Witness my hand and the seal of said court, this the thirty-first day of January, A. D. 1898.

(SEAL) CHAS. S. MORSE, *Clerk.*

S. B. 68.] CHAPTER XVIII.

AN ACT

To authorize counties to issue bonds for bridge purposes and to levy a tax to pay the same; also to validate bonds heretofore issued for bridge purposes.

SECTION 1. *Be it Enacted by the Legislature of the State of Texas*, That the County Commissioners' Courts of the several counties of this State are hereby authorized and empowered to issue bonds of said county, with interest coupons attached, for such amounts as may be necessary for the purpose of buying or constructing bridges for public uses within such county, said bonds to run not exceeding twenty years and bear interest at any rate not to exceed 8 per cent. per annum.

SEC. 2. The Commissioners' Court shall levy an annual *ad valorem* tax, not to exceed fifteen cents on the one hundred dollars valuation, sufficient to pay the interest thereon, and create a sinking fund for the redemption of said bonds. The sinking fund herein provided for shall not be less than 4 per cent. on the full sum for which the bonds are issued.

SEC. 3. Said bonds shall never be sold at less than their face value, and the interest on the same shall be paid annually on the tenth day of April of each year, and they shall be registered, and an account kept by the county treasurer, of the amount of said bonds, and the principal and interest paid on each, in a well bound book for the purpose; provided, that no county shall issue a larger amount of bonds than a tax of 10 per cent. on the one hundred dollars valuation of property in the county will liquidate in ten years.

SEC. 4. Said bonds shall be signed by the county judge

and countersigned by the county clerk, and registered by the treasurer before they are delivered.

SEC. 5. Moneys in the hands of the county treasurer belonging to the sinking fund of any county shall be first applied to the payment of said bonds, or be invested in ether bonds of that county, or other counties in the State, or in bonds of this State or United States; provided, in no case shall more than the face value be paid for the bonds above mentioned.

SEC. 6. All bonds heretofore issued for the purposes named in this bill are hereby validated; provided said bonds come within the limitations of the provisions of this bill.

SEC. 7. The near approach of the close of the session of the Legislature, and the importance of a law authorizing the issuance of bridge bonds, creates an emergency and a public necessity, that the constitutional rule requiring bills to be read on three several days be suspended, and that this act take effect and be in force from and after its passage, and it is so enacted.

I hereby certify that the within Senate bill No. 68, originated in the Senate and passed the same, January 13, 1884. Ayes 16, nays 11.

WM. NEAL RAMEY,
Secretary of the Senate.

I hereby certify that the within Senate bill No. 68, passed the House of Representatives by four-fifths vote, February 2, 1884.

J. W. B. BOOTH,
Chief Clerk House of Representatives.

NOTE.—The foregoing act was presented to the Governor of Texas for his approval on the fourth day of February, 1884, and was not signed by him or returned to the house in which it originated, with his objection

thereto, within the time prescribed by the Constitution, and therefore became a law without his signature.

J. W. BAINES,
Secretary of State.

General Laws of Texas, 1884, p. 29.

CHAPTER 141.

H. S. S. B. No. 54.] AN ACT

To authorize counties to buy, construct, or contract for the use of bridges, and to issue bonds and levy taxes to pay for the same, and to repeal all laws in conflict herewith.

SECTION 1. *Be it enacted by the Legislature of the State of Teras*, That the county Commissioners' Courts of the several counties of this State are hereby authorized and empowered to issue bonds of said county, with interest coupons attached, for such amounts as may be necessary, for the purpose of buying or constructing bridges for public uses within such county, said bonds to run not exceeding twenty years and bear interest at any rate not to exceed 8 per cent. per annum.

SEC. 2. The Commissioners' Courts hall levy an annual *ad valorem* tax, not to exceed fifteen cents on the one hundred dollars valuation, sufficient to pay the interest on and create a sinking fund for the redemption of said bonds. The sinking fund here provided shall not be less than 4 per cent. on the full sum for which the bonds are issued.

SEC. 3. Said bonds shall never be sold at less than their face value, and the interest of the same shall be paid annually on the tenth day of April of each year; and they shall be registered, and an account kept by the county treasurer of the amount of said bonds, and the principal and interest paid on each, in a well bound book for that purpose; *provided*, that no county already indebted shall issue a larger amount of bonds than a tax of ten cents on the one hundred dollars valuation of property in the county will liquidate in ten years; and the counties having no debts may issue such amount of bonds as a tax of ten cents on the one hundred dollars valuation of property in the county will liquidate in twenty years.

SEC. 4. Said bonds shall be signed by the county judge

and countersigned by the county clerk, and registered by the treasurer before they are delivered.

SEC. 5. Money in the hands of the county treasurer belonging to the sinking fund of any county shall be first applied to the payment of said bonds, or be invested in other bonds of that county or other counties in the State, or in bonds of this State or of the United States; *provided*, in no case shall more than the face value be paid for the bonds above mentioned.

SEC. 6. The Commissioners' Court of any county in this State may, when the cost of constructing a bridge over any bay or river in said county is two hundred and fifty thousand dollars or more, contract with any person, company or corporation for the right of the public to use such bridge, in such manner, upon such terms, and for such annual compensation as may be agreed upon by and between the owner or owners of such bridge and Commissioners' Court of the county where said bridge may be located; *provided*, no contract for the use of any such bridge shall be made for a longer time than twenty-five years. The Commissioners' Court shall levy a tax sufficient to pay the annual amount contracted for.

SEC. 7. All laws in conflict herewith be and the same are hereby repealed.

SEC. 8. The near approach of the close of the session of the Legislature, and the importance of a law authorizing the issuance of bridge bonds, creates an emergency and a public necessity exists that the constitutional rule requiring bills to he read on three several days be suspended, and that this act take effect and be in force from and after its passage, and it is so enacted.

(NOTE.—The foregoing act originated in the House and passed the same by a vote of 71 ayes, 19 nays, and passed the Senate by a two-thirds vote.)

Approved April 4, 1887.

General Laws of Texas for 1887, page 135.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1898.

No. 267.

ALBERT WADE, PETITIONER,

versus

TRAVIS COUNTY, TEXAS.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF ON BEHALF OF ALBERT WADE, PETITIONER.

I.—STATEMENT OF THE CASE.

This case comes before this Court by virtue of a writ of *certiorari* granted on the petition of Albert Wade and directed to the Circuit Court of Appeals for the Fifth Circuit. The petitioner was plaintiff in error in the Circuit Court of Appeals and plaintiff in the Circuit Court of the United States for the Western District of Texas, where his suit was originally brought. In the statement of the case we shall recite briefly so much of the proceedings in the trial court, in the appellate court and in this court as are necessary to be known in order to determine

the very limited range of questions, or rather the one question, now presented for decision.

The case was decided against plaintiff on a general demurrer, which admitted the facts alleged in his petition. The suit was brought on coupons detached from a certain issue of municipal bonds. The demurrer was based on the proposition that, by reason of certain constitutional and statutory laws of the State of Texas, it was essential to the validity of the issue of bonds and coupons in question that the municipal authority which issued the bonds, in this case a county commissioners' court, should have itself, at the time it authorized the issue, expressly provided for the levy and collection of a sufficient tax to pay the interest thereon and to provide a sinking fund of at least two per cent. The trial court and the appellate court, largely influenced, if not controlled, under the rule of comity in such cases, by the supposed construction of such laws by the State courts, adopted the theory of the law underlying the demurrer; and, as the petition did not allege a provision by the County Commissioner's Court for the levy and collection of a sufficient tax, etc., made contemporaneously with the contract under which the bonds were issued, the demurrer was sustained. The pleadings consisted of the petition and a general demurrer, with specifications. So much of the facts alleged in the petition, now material, are as follows:

That on July 3, 1888, the defendant county, represented by the duly constituted county authorities, and acting under and pursuant to an order of the Commissioners' Court of said county, entered into a contract with a certain bridge company for the construction of a county bridge in said county; that by the terms of the contract the bridge company agreed to construct the superstructure of an iron bridge over the Colorado river, the work to begin August 3, 1888, and to be completed on the 15th of November fol-

lowing, in consideration whereof the county agreed to pay the bridge company $47,000 in negotiable bonds, payable in twenty years and bearing 6 per cent. interest, payment to be made in part as the work progressed and the balance on the completion and final acceptance of the bridge; that the forty-seven bonds, with coupons attached, payable to bearer, were duly executed by the defendant county and delivered to the bridge company as required by the contract; that Albert Wade, petitioner, became the owner, by purchase in open market, for valuable consideration and before maturity, of the coupons representing the interest due on all of said bonds on April 10, 1893, April 10, 1894, April 10, 1895, the dates of the coupons which had been detached from said forty-seven bonds; that due presentment and demand for the payment of said coupons were made to the proper county authorities, but payment thereof was refused, and the same are still due and unpaid.

The petition alleged in detail facts in respect to the taxable values of Travis county in the years in which the contract was made and the bonds issued, from which it appeared that the exercise of the taxing power within the constitutional limit would be sufficient to pay the interest accruing on the bonds and provide the sinking fund contemplated by the Constitution and the statute under which they were issued. The petition contained other allegations of fact which are not deemed now to be material. But it was not alleged or shown that on the day and at the time the contract for the construction of the bridge and the issuance of the bonds was made, the County Commissioners' Court, which made the contract and ordered and authorized the issuance of the bonds, either made or provided for the levy of a tax to pay the interest on the bonds or to provide a sinking fund for their ultimate redemption. The petition closed with a prayer for judgment for the full amount due on said coupons, to-wit:

the sum of $8460 as principal, and interest at 6 per cent. per annum on each of said coupons from the dates that they respectively matured.

Defendant demurred generally to the petition on the ground that it stated no cause of action, and in specification thereof it said that the petition failed to allege that, at the time the debt was created, for which the bonds were issued, upon the coupons of which the suit was brought, any provision was made for the interest and, at least, 2 per cent. sinking fund upon said bonds.

The demurrer was sustained and, plaintiff declining to amend his petition, judgment was rendered in favor of defendant. The case was carried by writ of error to the Circuit Court of Appeals, which affirmed the judgment of the lower court.

The demurrer was based on the supposed application and requirements of Section 7 of Article 11 of the Constitution of the State of Texas, which reads as follows:

"SEC. 7. All counties and cities bordering on the coast of the Gulf of Mexico are hereby authorized, upon a vote of two-thirds of the taxpayers therein (to be ascertained as may be provided by law), to levy and collect such tax for construction of sea walls, breakwaters or sanitary purposes as may be authorized by law, and may create a debt for such work and issue bonds in evidence thereof. But no debt for any purpose shall ever be incurred in any manner by any city or county unless provision is made at the time of creating the same for levying and collecting a sufficient tax to pay the interest thereon, and provide at least 2 per cent. as a sinking fund; and the condemnation of the right of way for the erection of such works shall be fully provided for."

The contention in support of the demurrer which prevailed in the trial and in the appellate court was: *First*, that the clause in Sec. 7 requiring provision for payment at the time of creating the debt applied to all counties and cities, whether bordering on the coast of the Gulf of

Mexico or not; *second*, that the effect of the provision was to require the County Commissioners' Court, when contracting any debt, to provide at the same time, by its own order or resolution, for levying and collecting a sufficient tax to pay the interest and to provide at least 2 per cent. as a sinking fund, obedience to such requirements being essential to the validity of the debt; and *third*, that this section 7, with this meaning and effect, applied to contracts for county bridges and the issuance of bonds in payment thereof, notwithstanding the provision of Sec. 2, Art. 11, of the State Constitution, which provided that "the construction of jails, court-houses and bridges, and the establishing of county poorhouses and farms, and the laying out, construction and repairing of country roads, shall be provided for by general laws," and notwithstanding the provision of a statute of the State of Texas, passed in compliance with Sec. 2, Art. 11, of the Constitution, authorizing the issuance of bonds for county bridges and itself making provision for the levy and collection of a sufficient tax to pay the interest and to provide a sinking fund exceeding 2 per cent.

On the other hand, it was unsuccessfully argued and claimed on behalf of plaintiff, the present petitioner, *first*, that Sec. 7 of Art. 11 of the State Constitution did not apply to the defendant county, which was not a county bordering on the coast of the Gulf of Mexico, and *second*, that if said section was applicable, then the requirements of said section were fully complied with in and by the act of the Legislature under authority of which the bonds and coupons in question were issued, namely, Chapter 141 of the General Acts of the Legislature for the year 1887, entitled "An act to authorize counties to buy, construct or contract for the use of bridges, and to issue bonds and levy taxes to pay for the same, and to repeal all laws in conflict therewith;" Sec. 1 of which act authorizes and empowers the County Commissioner's

Court of the several counties of the State to issue bonds of the county, with interest coupons attached, for such amounts as may be necessary, for the purpose of buying or constructing bridges for public uses within such county, said bonds to run not exceeding twenty years and bear interest at any rate not to exceed 8 per cent. per annum, and Sec. 2 of which act provides that "the Commissioners' Court shall levy an annual *ad valorem* tax, not to exceed fifteen cents on the $100 valuation, sufficient to pay the interest on and create a sinking fund for the redemption of said bonds—the sinking fund herein provided for shall not be less than 4 per cent. on the full sum for which the bonds are issued;" that the provision made in Sec. 2 of said law for the payment of the interest and the creation of a sinking fund for the bonds contemplated therein entered into and formed part of any contract for the purchase or construction of any bridge and the issuance of bonds in payment thereof which any County Commissioners' Court might make under the authority of said law, and constituted a full compliance with the requirements of Sec. 7 of Art. 11 of the State Constitution, and rendered unnecessary any provision at the time of the contract by the County Commissioners' Court for the levy and collection of a sufficient tax to pay the interest and to provide a sinking fund of at least 2 per cent.

The opinions and decisions of the Circuit Court and of the Circuit Court of Appeals are included in the printed record of this case. The former is reported in 72 Fed. Rep., pp. 985 ffg., and the latter in 81 Fed. Rep., pp. 742 ffg.

By reference thereto it will be seen that the demurrer was sustained on the ground that the provisions of Sec. 7, Art. 11, of the State Constitution applied to the contract and bonds in question, and that, by reason thereof, it was essential to the validity of said bridge contract and bonds that the County Commissioners' Court, when it made the

contract and authorized the issuance of the bonds, should have, itself, at that time, expressly provided for the levy and collection of a sufficient tax to pay the interest thereon, and to provide a sinking fund of at least 2 per cent., and that, in the absence of a showing that the County Commissioners' Court did itself make special provision for levying and collecting such a tax at the time the bridge contract was entered into, the petition in the Court below failed to state a good cause of action.

It will also appear from the opinion and decision of the Circuit Court of Appeals that, in so doing, the Court considered that it was following, and was bound in comity, and by the custom and practice of the federal courts to follow, the jurisprudence of the Supreme Court of the State of Texas on the questions at issue. The rule which thus controlled its decision was embodied by the Court of Appeals in the syllabus or headnotes of its decision, as follows: "A decision of the highest court of a State construing a provision of the State Constitution, limiting the powers of counties and cities as to the creation of debts, is binding on the federal courts." As will be shown hereafter, the decisions of the Supreme Court of Texas, to which the Circuit Court of Appeals referred, and which it regarded as conclusive against the contention made on behalf of the plaintiff in error, were not cases involving the issuance of bonds for an indebtedness authorized by an act of the Legislature which itself made provision for a sufficient tax to pay interest and create a sinking fund of at least 2 per cent .Nevertheless, the Court of Appeals considered that the Supreme Court of the State had so construed Sec. 7 of Art. 11 of the Constitution as to make it applicable to the contract and bonds in question, and to make a contemporaneous provision by the County Commissioners' Court for levying and collecting a sufficient tax, etc., an essential condition to the validity of the bonds.

After the decision of this case by the Circuit Court of Appeals, and after the expiration of the time within which, under rules of that Court, an application for a rehearing will be entertained, the Supreme Court of Texas decided the case of *County of Mitchel vs. City National Bank of Paducah, Ky.*, reported in 43 Southwestern Reporter, 880. In that case there were presented to the Supreme Court of Texas for decision the identical questions involved in petitioner's case, namely, whether or not the provisions of Sec. 7 of Art. 11 of the Constitution of Texas was applicable to counties not bordering on the coast of the Gulf of Mexico, and, if so, whether or not, in case of a debt created for bridge purposes and of bonds issued in evidence or payment thereof, under authority of a statute making provision for a sufficient tax to pay the interest and create a sinking fund, it was necessary for the County Commissioners' Court itself to provide at the time for the levy and collection of a sufficient tax, etc. A reference to the opinion in the Mitchel county case will show that the Court decided that whether or not Sec. 7 of Art. 11 of the Constitution of Texas was applicable to counties not bordering on the gulf coast was an open question, which it was not then necessary to decide; that, assuming said constitutional provision to apply to all counties in the State, wherever situated, it was in the power of the Legislature to make for cities and counties the provision for a sufficient tax, etc., required by Sec. 7; and that an act of the Legislature which, like Sec. 2 of the act of 1887, quoted above, provided that the Commissioners' Court should levy a certain annual tax sufficient to pay the interest and provide a sinking fund for the redemption of the bonds therein authorized to be issued, constituted such a "provision" for a sufficient tax as fully met the requirements of the constitutional provision in question and rendered unnecessary to the validity of the bonds authorized by

the act that the Commissioners' Court should make any provision for levying any tax at the time of making the contract or issuing the bonds.

Soon after the decision by the Supreme Court of Texas of the Mitchel county case petitioner filed in this Court his petition for a writ of *certiorari*. The petition set forth the foregoing facts and other circumstances, not necessary now to mention, in support of its application, and your Honors directed the writ to be issued.

II.—ARGUMENT.

We shall first address ourselves to the easy task of showing that the construction of the Constitution and statutes of the State of Texas, announced by the Circuit Court of Appeals in this case, is directly opposed to the construction of the same constitutional and statutory law by the Supreme Court of Texas; in other words, that, under the law as announced by the Supreme Court of Texas, it was error to sustain the demurrer to the petition. We shall then very briefly discuss the two opposing views of the law, evidenced by the opinion of the Circuit Court of Appeals in this case and by the opinion of the Supreme Court of Texas, in the Mitchel county case. The discussion will be very brief, first, because we believe that this Court will follow the decision of the Supreme Court of Texas, in accordance with the rule laid down by the Court of Appeals, itself, in this case, that "a decision of the highest court of a State construing a provision of the State Constitution, limiting the powers of counties and cities as to creation of debts, is binding on the Federal courts;" and, second, because, in our judgment, the reasoning and authorities contained in the opinion in the Mitchel county case are sufficient to secure the acceptance of the conclusions reached by the Supreme Court of Texas, if your Honors should consider that the

rule of comity above referred to ought not to be controlling in this case.

The identity of the legal questions presented and the contrariety of the conclusions reached in this case and in the Mitchel county case will at once appear from a simple reading of the opinions in the two cases; but for the convenience of the Court we shall now briefly compare the two decisions.

In the Mitchel county case one of the bond issues, the validity of which was contested, was one of bonds issued under the authority ot the Commissioners' Court of Mitchel county in payment for a county bridge. The authority for the action of the county officials was an act entitled "An act to authorize counties to issue bonds for bridge purposes and to levy a tax to pay the same," being Chapter 18 of the general laws of 1884. Sections 1 and 2 of this act are as follows:

"SECTION 1. *Be it enacted by the Legislature of the State of Texas*, That the County Commissioners' Courts of the several counties of this State are hereby authorized and empowered to issue bonds of said county, with interest coupons attached, for such amounts as may be necessary for the purpose of buying or constructing bridges for public uses within such county, said bonds to run not exceeding twenty years and bear interest at any rate not to exceed 8 per cent. per annum.

"SEC. 2. The Commissioners' Court shall levy an annual *ad valorem* tax not to exceed fifteen cents on the one hundred dollars valuation, sufficient to pay the interest thereon, and create a sinking fund for the redemption of said bonds. The sinking fund herein provided for shall not be less than 4 per cent. on the full sum for which the bonds are issued."

This act, as stated by the Supreme Court in its decision, was enacted in pursuance of Sec. 2 of Art. 11 of the Constitution of Texas, which provides: "The construction of jails, court houses and bridges, and the establishment

of county poorhouses and farms, and the laying out, construction and repairing of county roads, shall be provided for by general laws."

In the present case the bonds in question were issued, in payment for a county bridge, under the authority of the County Commissioners' Court of Travis county, whose power to act was derived from an act entitled "An act to authorize counties to buy, construct, or contract for the use of bridges, and to issue bonds and levy taxes to pay for the same, and to repeal all laws in conflict herewith," being chapter 141 of the general laws of 1887. Secs. 1 and 2 of this act are identical with the corresponding sections of the act of 1884, and read as follows:

"SECTION 1. *Be it enacted by the Legislature of the State of Texas*, That the County Commissioners' Courts of the several counties of this State are hereby authorized and empowered to issue bonds of said county, with interest coupons attached, for such amounts as may be necessary for the purpose of buying or constructing bridges for public uses within such county, said bonds to run not exceeding twenty years, and bear interest at any rate not to exceed 8 per cent. per annum.

"SEC. 2. The Commissioners' Court shall levy an annual *ad valorem* tax, not to exceed 15 cents on the $100 valuation, sufficient to pay the interest thereon, and create a sinking fund for the redemption of said bonds. The sinking fund herein provided for shall not be less than 4 per cent. on the full sum for which the bonds are issued."

This act, like the act of 1884, which it superseded, was passed in compliances with the requirements of Sec. 2 of Art. 11 of the Constitution quoted above. The two acts are printed in full in the appendix of this brief.

It appears from the decision of the Court in the Mitchel county case that the Commissioners' Court, at the time the bonds in question were issued or the contract calling for them was made, did not make any provision for levying

and collecting a sufficient tax to pay the interest thereof and to provide a sinking fund of at least 2 per cent. It appears from the pleadings and the decision of the Court in the present case that the Commissioners' Court likewise failed to make provision for levying and collecting a sufficient tax, etc., at the time the contract was made and the issue of the bonds ordered. And in both cases the defence was that the omission of the Commissioners' Court to make such provision operated the nullity of the bond issues, because in violation of the mandate contained in Sec. 7 of Art. 11 of the State Constitution.

In neither case was the fact disputed, that, considering the taxable values of the county in the year in which the bonds in question were issued, the exercise of the taxing power within the constitutional limit would be sufficient to pay the interest accruing on the bonds and to provide the sinking fund required by the Constitution and the statute under which they were issued.

Coming to the conclusions of law announced by the two courts, we find that the Circuit Court of Appeals considered that the question of whether the requirements of Sec. 7 of Art. 11 of the State Constitution applied to all cities and counties, whether bordering on the gulf coast or not, had been settled, and that they applied to all municipal corporations wherever situated; but that the Supreme Court of Texas declared that whether that section applied to such bonds as were then in suit was an open question, the decision of which was not necessary in the case before the Court. Section 7 of Art. 11 is as follows: "All counties and cities bordering on the coast of the Gulf of Mexico are hereby authorized upon a vote of two-thirds of the taxpayers therein (to be ascertained as may be provided by law) to levy and collect such tax for construction of sea walls, breakwaters, or sanitary purposes as may be authorized by law, and may create a debt for such works and issue bonds in evidence thereof. But no debt for any

purpose shall ever be incurred in any manner by any city or county, unless provision is made at the time of creating the same for levying and collecting a sufficient tax to pay the interest thereon and provide at least 2 per cent. as a sinking fund; and the condemnation of the right-of-way for the erection of such works shall be fully provided for."

The Supreme Court of Texas assumed, for the purposes of the Mitchel county case, that the above quoted article was applicable to the indebtedness then in question, and we shall make a like assumption in the argument of this case. Applying Sec. 7, Art. 11, to petitioner's case, the Circuit Court of Appeals held that it was essential to the validity of the bridge contract and of the bonds sued on that the County Commissioners' Court, when it made the contracts and authorized the issuance of the bonds, should have itself, at that time, expressly provided for the levy and collection of a sufficient tax to pay the interest thereon and to provide a sinking fund of at least 2 per cent., and that, as the petition of plaintiff in the court below failed to show that the County Commissioners' Court did make such special contemporaneous provision for a sufficient tax, etc., no cause of action had been stated and the general demurrer must be sustained. The court passed over, *sub silentio*, the effect of the special circumstance that the bonds had been issued under authority of the act of 1887, and thus held, in effect, that the requirements of Sec. 7 had not or could not be met by legislative provision for the levying and collection of a sufficient tax.

On the other hand, the Supreme Court of Texas, addressing itself to the identical questions, said: "It was not the purpose of the convention, in adopting the foregoing articles, to require that a city or county should at the time of creating a debt ascertain the rate per cent. required to be levied upon the taxable values of the county, in order to raise a sufficient sum to pay the inter-

est and provide a sinking fund upon that debt, and to actually levy that rate at the time." After citing authorities in support of this proposition, the Court goes on to say: "What the Constitution requires is that provision shall be made at the time, or shall have been previously made, by which the rate of tax to be levied is so definitely fixed—as was done in the case last cited—that it becomes merely a ministerial act to determine the rate to be levied. The Legislature has the power to make all such 'provision' for counties and cities, or it may leave it to the officers of such corporations to make it, when the debt is created; if made by either it is sufficient. Mitchel county has not provided for the collection of such tax, and the solution of the question now before us depends upon whether the laws under which the bonds were issued made such provisions as the Constitution required. On behalf of Mitchel county it is urged that by the terms of Sec. 7, Art. 11, of the Constitution the 'provision' which is required to be made for levying and collecting taxes with which to pay the interest and create a sinking fund upon the indebtedness of a county must be made by the officers of the county *at the time* the debt is incurred, and that the source of authority for making the levy and collecting the tax is the Constitution, and not the act of the Legislature." The Court then discusses Sec. 7, in connection with other provisions of the Constitution, and reaches the conclusion that it "contains no grant of authority to levy a tax nor designation of any official by whom the tax specified is to be levied and collected, but is in effect a limitation upon the power of the Legislature to authorize such corporations to create debts." After citing some authorities on the interpretation of constitutions, the Court declares: "It is quite too plain for argument that if the laws of 1881 and 1884 or similar laws had never been passed, Mitchel county would have had no authority under the Constitu-

tion to contract the debts represented by the bonds nor to levy a tax for the payment of the interest and sinking fund on such debt; the power to do so could be derived from the Legislature only. If the Legislature had the power to grant authority to the county to make such provision, then that department could exercise the power itself. If the terms of the law are such that where the county has issued its bonds in compliance with it, the bondholder might resort to a Court and by *mandamus* compel the county to levy tax sufficient to pay the interest annually and to raise a sinking fund of not less than 2 per cent., then the provision would be sufficient under the Constitution. Whether less certain directions might meet the demands of the Constitution is not before us. This brings us to the consideration of the question, were the requirements of the statutes under which these bonds were issued so explicit as to constitute a compliance with the mandate of the Constitution?"

One of the bond issues, the validity of which was questioned in the Mitchel county case, was an issue of bonds for court-house and jail purposes. The authority for such bonds was a statute passed in 1881. Unlike the act of 1884 and the act of 1887 (under which petitioner's bonds were issued), the act of 1881, while requiring the levy of a sufficient tax to pay the interest and create a sinking fund, did not specify the per cent. of sinking fund. The Court considered at length the question whether such a law met the constitutional requirement, and concluded that it did, inasmuch as the act must be read in connection and harmonized with the mandate of the Constitution, that a sinking fund of at least 2 per cent. must be provided for. As the acts of 1884 and 1887 provided for a sinking fund of 4 per cent., the sufficiency of such a provision to meet the mandate of the Constitution was considered manifest. After quoting from the acts of 1881 and 1884 it was said:

"The statutes quoted above were enacted by the Legislature in view of the requirements of Secs. 2 and 7, Art. 11, of the Constitution, and with the evident purpose of giving effect to the terms of those sections. As we have said before, the Legislature might have empowered the Commissioners' Court to provide for collecting the tax required by the Constitution, but it pursued, as we think, the wiser course of making the necessary provision by a general law, which applied to and governed the issuance of all bonds for the given purpose, whereby the taxpayer and the bondholder would be alike protected and uniformity secured."

The Court discussed at length, upon principle and authority, the question whether the legislative provisions in the two acts were sufficient to satisfy the constitutional requirement, and held that it was. "It therefore follows," said the Court, "that it was a legal duty resting upon that court (the Commissioners' Court), after issuing and selling the bonds under the authority given in the first section of each article, to annually levy and collect the tax necessary to raise the interest and sinking fund not less than the minimum expressed in each law and the District Court had the authority to enforce the performance of that duty by writ of mandamus, but would not control the discretion vested in the Commissioners' Court to levy and collect a tax which would provide for a sinking fund greater than 2 per cent. We think it manifest that there was no act involved in the performance of the duty enjoined by Sec. 2 of each of the acts which required the exercise of any discretion on the part of the Commissioners' Court, but that having determined the questions upon which the issuing of the bonds depended, there remained nothing to be done but to perform the ministerial act of ascertaining the sum to be collected and the rate per cent. necessary to be levied upon the taxable values of the county each year and that

the performance of this duty the District Court had the authority to enforce by a writ of mandamus."

We have no concern with the other questions discussed by the Court arising out of certain irregularities in the issuance of the bonds in question, *e. g.*, loaning court-house bonds to the bridge fund, etc. Suffice it to say that upon the principles and reasoning, sufficiently indicated by the above quotations from the opinion, the bridge bonds in question were declared to be valid obligations of the county.

We submit that no argument is necessary to show the legal identity of the facts and issues involved in the two cases and the contrariety of the conclusions reached by the two courts.

The remaining question is, whether this Court will adopt and apply to this case the conclusions of the Supreme Court of the State of Texas, or the contrary conclusions of the United States Court of Appeals for the Fifth Circuit. If the views of the Supreme Court of Texas prevail, the right of petitioner to the relief he seeks here will not be questioned. For if it be true, as declared by the Supreme Court of Texas, that it is not necessary for the provision required by the Constitution for interest and sinking fund of county bonds to be made by the Commissioners' Court, that the legislative provision is an execution of the constitutional mandate, that when the Commissioners' Court has created the debt and failed to levy the tax it does not affect the validity of the obligation, but the necessary levy may be compelled by mandamus, it follows, of course, that the demurrer to plaintiff's petition was not well founded in law, and that it was error to sustain it.

It does not now require argument or citation of authority to show the existence or propriety of the rule which has always been observed in this Court, that, in questions involving the construction or interpretation of the Constitution or statutes of a State, the decision of the highest

court of the State should be accepted and followed by the federal courts. Especially is this rule applicable to laws and controversies thereunder affecting political subdivisions of the State, limitations upon their powers, regulations in regard to the creation of debts by them, etc., all matters of purely internal concern and domestic policy. It can not be said, in opposition to the application of the rule in the present case, that there has been vacillation and uncertainty in the jurisprudence of the State, and that private rights which have grown up under one construction of the law will be sacrificed by a contrary construction. No case prior to the Mitchel county case has been cited, and we believe no case can be cited, where the question of the effect of a legislative provision for the levy and collection of a sufficient tax, etc., such as is made in the act of 1887, under which petitioner's bonds were issued, was presented or considered, or where the State Court has pronounced against the validity of county bonds, issued for the special purposes and under the special authority covered by Sec. 2 of Art. 11 of the Constitution, and the legislation passed in compliance therewith, because of the failure of the Commissioner's Court to make provision for interest and sinking fund when it authorized the issuance of the bonds. It will hardly be contended that a construction of the law tending to make municipal corporations pay their honest debts, evidenced by negotiable instruments in the hands of innocent third persons, is objectionable because of any possible injurious effect upon private rights.

For the foregoing reasons, which we do not deem it necessary in this Court to support by extended argument, we submit that your Honors should follow the construction of the Constitution and statutes of the State of Texas, laid down by the Supreme Court of the State, even if your Honors are of the opinion that you might have

reached a different conclusion in the exercise of an independent judgment. But should the Court consider that the rule which we have invoked ought not to be controlling in this case, then we submit that, without reference thereto, the petitioner is entitled to the relief prayed for, because the Supreme Court of Texas was right, and the Circuit Court of Appeals wrong, in the construction respectively given by the two courts to the constitutional and statutory provisions in question.

In regard to this last proposition we are willing to rest our case upon the reasoning and authorities contained in the Mitchel county case. The opinion in that case is self-supporting. We shall, however, very briefly refer to the authorities cited in the opinion of the Circuit Court of Appeals in order to show that they do not touch the points upon which we rely for the reversal of the decision of that court. The decision in the case of Quaker City National Bank vs. Nolan County (C. C. A.), 66 F. R. 88, was very brief. The Court simply held that the Supreme Court of the State had decided that Sec. 7 of Art. 11 was applicable, and, hence, that the failure of the Commissioners' Court to itself make contemporaneous provisions for the levy of a tax was fatal to the validity of the bonds. In Millsaps vs. City of Terrell (C. C. A.), 60 F. R. 193, the Court decided that the bonds sued on were invalid because issued at a time when the city had already levied taxes to the full limit prescribed by the Constitution and pledged the same to other indebtedness, and, therefore, it was a legal impossibility to comply with the requirements of Secs. 5 and 7, Art. 11, in respect to the later bonds. Francis vs. Howard County (C. C. A.), 54 F. R. 487, was a case involving simply an overissue of bonds. The case of Terrell vs. Dessaint, 71 Tex. 770 (9 S. W. 593), was one brought on a promissory note of the city of Terrell, for $2000, payable in two years, which contained the recital that it was given in payment for material for

waterworks supplies, and was payable out of the tax of ¼ per cent. collected annually for general purposes. The note represented part of the purchase price of certain material for the extension of the waterworks of the city. As there was no contemporaneous provision made by the municipal corporation, and no previous legislative provision for the payment of this debt, and as it was not a debt for current expenses, recovery upon the note was denied. There is nothing in Terrell vs. Dessaint, or in Nolan County vs. State, 83 Tex. 183 (17 S. W. R. 823), which militates in any way against the contention made in support of the present application. In respect to each of these cases it may be truly said that the crucial question in this case, the sufficiency of a legislative provision for the levying of a tax as a compliance with the mandate of the Constitution, was either not involved or not presented, considered or decided.

To deny petitioner the relief he now seeks this court must give a construction to the Constitution and statutes of Texas diametrically opposed to the construction placed upon them by the Supreme Court of the State. The result will be inconsistent and antagonistic decisions by the State and Federal courts in Texas respecting the validity of municipal bond issues, and the practical closing of the Federal courts to the holders of the large number of county bonds issued under the same circumstances as were petitioner's bonds. We submit that the rule under which the Federal courts follow the State courts in such matters, and the principles and authorities upon which the Supreme Court of Texas has supported its decision in the Mitchel county case, are sufficient, separately and together, to secure from your Honors a decree in favor of petitioner which will correct the error of which he complains and harmonize the jurisprudence of the State and Federal courts in Texas on a question of such importance

as the powers and limitations of counties in respect to issuance of negotiable bonds.

We therefore ask that your Honors do quash and reverse the judgment and decree of the Circuit Court of Appeals for the Fifth Circuit and do render a judgment reversing and setting aside the judgment of the United States Circuit Court for the Western District of Texas, brought up for review in said Court of Appeals by writ of error, and remanding the cause for further proceedings in accordance with the opinion and judgment of this Court.

Respectfully submitted,

FRANK W. HACKETT,

JOSEPH PAXTON BLAIR,

Counsel for Albert Wade, Petitioner.

APPENDIX.

S. B. 68.] CHAPTER XVIII.

AN ACT

To authorize counties to issue bonds for bridge purposes and to levy a tax to pay the same; also to validate bonds heretofore issued for bridge purposes.

SECTION 1. *Be it enacted by the Legislature of the State of Texas*, That the County Commissioners' Courts of the several counties of this State are hereby authorized and empowered to issue bonds of said county, with interest coupons attached, for such amounts as may be necessary for the purpose of buying or constructing bridges for public uses within such county, said bonds to run not exceeding twenty years and bear interest at any rate not to exceed 8 per cent. per annum.

SEC. 2. The Commissioners' Court shall levy an annual *ad valorem* tax, not to exceed fifteen cents on the $100 valuation, sufficient to pay the interest thereon and create a sinking fund for the redemption of said bonds. The sinking fund herein provided for shall not be less than 4 per cent. on the full sum for which the bonds are issued.

SEC. 3. Said bonds shall never be sold at less than their face value, and the interest on the same shall be paid annually on the tenth day of April of each year, and they shall be registered and an account kept by the county treasurer of the amount of said bonds, and the principal and interest paid on each, in a well-bound book for the purpose; provided, that no county shall issue a larger amount of bonds than a tax of 10 per cent. on the $100 valuation of property in the county will liquidate in ten years.

SEC. 4. Said bonds shall be signed by the county judge

and countersigned by the county clerk, and registered by the treasurer before they are delivered.

SEC. 5. Moneys in the hands of the county treasurer belonging to the sinking fund of any county shall be first applied to the payment of said bonds, or be invested in either bonds of that county, or other counties in the State, or in bonds of this State or the United States; provided, in no case shall more than the face value be paid for the bonds above mentioned.

SEC. 6. All bonds heretofore issued for the purposes named in this bill are hereby validated; provided said bonds come within the limitation of the provisions of this bill.

SEC. 7. The near approach of the close of the session of the Legislature, and the importance of a law authorizing the issuance of bridge bonds, creates an emergency and a public necessity, that the constitutional rule requiring bills to be read on three several days be suspended, and that this act take effect and be in force from and after its passage, and it is so enacted.

I hereby certify that the within Senate bill No. 68 originated in the Senate and passed the same, January 13, 1884. Ayes 16, nays 11.

WM. NEAL RAMEY,
Secretary of the Senate.

I hereby certify that the within Senate bill No. 68 passed the House of Representatives by four-fifths vote, February 2, 1884.

J. B. W. BOOTH,
Chief Clerk House of Representatives.

NOTE.—The foregoing act was presented to the Governor of Texas for his approval on the fourth day of February, 1884, and was not signed by him or returned to the house in which it originated, with his objection

thereto, within the time prescribed by the Constitution, and therefore became a law without his signature.

J. W. BAINES,
Secretary of State.

General Laws of Texas, 1884, p. 29.

CHAPTER 141.

H. S. S. B. No. 54.] AN ACT

To authorize counties to buy, construct, or contract for the use of bridges, and to issue bonds and levy taxes to pay for the same, and to repeal all laws in conflict herewith.

SECTION 1. *Be it enacted by the Legislature of the State of Texas*, That the County Commissioners' Courts of the several counties of this State are hereby authorized and empowered to issue bonds of said county, with interest coupons attached, for such amounts as may be necessary, for the purpose of buying or constructing bridges for public uses within such county, said bonds to run not exceeding twenty years and bear interest at any rate not to exceed 8 per cent. per annum.

SEC. 2. The Commissioners' Court shall levy an annual *ad valorem* tax, not to exceed fifteen cents on the one hundred dollars valuation, sufficient to pay the interest on and create a sinking fund for the redemption of said bonds. The sinking fund here provided shall not be less than 4 per cent. on the full sum for which the bonds are issued.

SEC. 3. Said bonds shall never be sold at less than their face value, and the interest of the same shall be paid annually on the tenth day of April of each year; and they shall be registered, and an account kept by the county treasurer of the amount of said bonds, and the principal and interest paid on each, in a well bound book for that purpose; *provided*, that no county already indebted shall issue a larger amount of bonds than a tax of ten cents on the one hundred dollars valuation of property in the county will liquidate in ten years; and the counties having no debts may issue such amount of bonds as a tax of ten cents on the one hundred dollars valuation of property in the county will liquidate in twenty years.

SEC. 4. Said bonds shall be signed by the county judge

and countersigned by the county clerk, and registered by the treasurer before they are delivered.

SEC. 5. Money in the hands of the county treasurer belonging to the sinking fund of any county shall be first applied to the payment of said bonds, or be invested in other bonds of that county or other counties in the State, or in bonds of this State or of the United States; *provided*, in no case shall more than the face value be paid for the bonds above mentioned.

SEC. 6. The Commissioners' Court of any county in this State may, when the cost of constructing a bridge over any bay or river in said county is $250,000 or more, contract with any person, company or corporation for the right of the public to use such bridge, in such manner, upon such terms, and for such annual compensation as may be agreed upon by and between the owner or owners of such bridge and Commissioners' Court of the county where said bridge may be located; *provided*, no contract for the use of any such bridge shall be made for a longer time than twenty-five years. The Commissioners' Court shall levy a tax sufficient to pay the annual amount contracted for.

SEC. 7. All laws in conflict herewith be and the same are hereby repealed.

SEC. 8. The near approach of the close of the session of the Legislature, and the importance of a law authorizing the issuance of the bridge bonds, creates an emergency and a public necessity exists that the constitutional rule requiring bills to be read on three several days be suspended, and that this act take effect and be in force from and after its passage, and it is so enacted.

(NOTE.—The foregoing act originated in the House and passed the same by vote of 71 yeas, 19 nays, and passed the Senate by a two-thirds vote.)

Approved April 4, 1887.

General Laws of Texas for 1887, page 135.

Supreme Court of the United States.

OCTOBER TERM, 1898.

ALBERT WADE, *Petitioner*,
vs.
TRAVIS COUNTY, TEXAS. } No. 267.

SUPPLEMENTARY BRIEF FOR PETITIONER.

STATEMENT OF FACT.

It may serve a useful purpose to state the facts once more, specifying with more particularity than in our opening brief the several grounds of demurrer relied on by Travis County, and our respective replies thereto.

In 1888 the County of Travis, Texas (in which is the City of Austin, the capital), entered into a contract through its proper authorities for the building of a bridge. This bridge was built, and is a permanent improvement in the County. The proper authorities of the County contracted to pay therefor to the bridge builders $47,000, in bonds of the County, bearing six per cent. interest, and payable in twenty years from date. Five bonds of $1,000 each were executed and delivered by the County to the Company, in part payment, on December 6, 1888. December 22, the County delivered ten bonds; and on February 12, 1889, ten more bonds, making $25,000 bonds in all. On 3d July, 1889, the County delivered the remaining bonds, numbered from 26 to 47, to the Bridge Company. All the bonds were in due form, and signed by the proper officers. The Company sold them in the market.

The petitioner is the legal owner and holder of the coupons due on all the bonds upon the respective dates of April 10th, in the years 1893, 1894 and 1895. Each coupon, excepting the first, save in number and date of maturity, is in words and figures as follows:

"$60. Due April 10, 18... No....
"The County of Travis will pay to bearer, at the treasury of the County of Travis, sixty dollars, on April 10th, 1895, being interest for one year on bond No...."
(The signatures of the County Judge and the County Clerk follow.)

The County paid the interest regularly until the 10th of April, 1893, on which date, and ever since, the County has refused to redeem its coupons.

The petitioner, Albert Wade, a citizen of Illinois, brought suit upon his coupons, in the Circuit Court of the United States for the western district of Texas, on the 18th of January, 1896. The amended petition will be found at pages 5–12 of the record.

The petition sets out the fact of the building of the bridge, and recites the contract in an exhibit. It alleges that prior to making the contract, the defendant at a regular term of the Commissioners' Court, levied taxes for the year 1888, and for subsequent years as required by law, a proportion of which were for road and bridge purposes. The petition in terms declares that the requirements of the law were followed in regard to the levying of the taxes for the payment of the interest and principal of these bonds; and that an amount unappropriated for other purposes was sufficient to pay the interest, and the sinking fund on the bonds; that the tax levied was ordered at the regular term of the court; and that the tax orders and levies, upon a delivery of said bonds, had become part of the contract of the County.

The petitioner avers he purchased the coupons for a full

and valuable consideration in open market, and that he is the legal owner and holder of the same. Other exhibits to the petition set forth the action of the Commissioners' Court at various dates with reference to levying a tax for road and bridge purposes, and for the creation of a sinking fund for the payment of bridge bonds.

The County demurred, setting up six grounds of demurrer (Rec., 13).

The first ground is that the petition fails to allege that at the time the debt was created for which the bonds were issued, upon the coupons of which this suit is brought, any provision was made for the interest and at least two per cent. sinking fund upon said bonds. This first specification of demurrer will be found to prove the turning point of the case.

The District Judge, MAXEY, was of opinion that the bonds were illegal, because their issue was not in accordance with the requirement of the Constitution—that "no debt for any purpose shall ever be incurred in any manner by a county, unless provision is made at the time of creating the same for levying and collecting a sufficient tax for the interest and sinking fund above specified." (Rec., 3.) This view was sustained by the Circuit Court of Appeals. The opinion of NEWMAN, District Judge of that Court (Rec., 18–20), is based upon an interpretation of the following words in sect. 7 of the Constitution: "No debt for any purpose shall ever be incurred in any manner by any city or county unless provision is made at the time of creating the same for levying and collecting a sufficient tax to pay the interest thereon and provide at least two per cent. as the sinking fund; and the condemnation of the right of way for the erection of such works shall be fully provided for."

In explanation of the language "erection of such works" it is to be said that sect. 7 had been adopted by the Constitutional Convention immediately after a great hurricane

had swept over the Gulf coast, submerging a part of the city of Galveston, and causing great destruction of life and property. (Rec., 19.)

Section 7 begins as follows: "All counties and cities bordering on the coast of the Gulf of Mexico are hereby authorized upon a vote of two-thirds of the tax payers therein (to be ascertained as may be provided by law) to levy and collect such tax for construction of sea-walls, break-waters or sanitary purposes as may be authorized by law, and may create a debt for such work and issue bonds in evidence thereof." Then follow the restrictive words above quoted.

The petitioner contended that sect. 7 applied only to cities and counties upon the Gulf coast. The Supreme Court of Texas has not as yet determined whether the restriction of this section applies to all the counties of the State, though there have been intimations and *obiter* expressions by the Court to the effect that it does so apply. In disposing of the present case, it will be unnecessary, we think, to determine whether the language of the section is to be taken as of general application, or should be restricted (as it would more reasonably appear to be the intention), to cities and counties bordering upon the Gulf of Mexico.

A preliminary enquiry arose in the Circuit Court as to the qualification of the District Judge to sit, he having been at the time a resident and citizen of Travis County, and a taxpayer there. This question, however, may be treated as having been dropped from the case.

The opinion of the Circuit Court of Appeals (NEWMAN, J.) is to the effect that the constitutional requirement just mentioned, of making provision at the time of creating the debt for levying and collecting a sufficient tax to pay the interest thereon, and provide at least two per cent. as a sinking fund, was not complied with in the present case; and for that reason the bonds were illegal. The opinion was filed 16th June, 1897. (Rec., 18.)

The vital question as to the meaning of the requirement

of the Constitution in respect to providing for collecting a tax, etc., we have contended was made the subject of a careful and thorough examination by the Supreme Court of Texas in *County of Mitchel* v. *City National Bank of Paducah.* The opinion delivered January 10, 1898, sustained the bonds, which were bridge bonds issued under circumstances nearly identical with those in suit. The ground for sustaining the bonds may be stated in a word as follows: Admitting that section 7 of the Constitution applies to an interior county, the requirement that provision shall be made for collecting a tax, etc., is met by the legislative enactment of 1884, entitled an "Act to authorize counties to buy, construct or contract for the use of bridges and to issue bonds and levy taxes to pay for the same, and to repeal all laws in conflict therewith." This act provided that the Commissioners' Court should levy a certain annual tax sufficient to pay the interest, and provide a sinking fund for the redemption of the bonds. The Supreme Court of Texas has determined that the passage of this act has constituted such a "provision" in this respect for a tax as answers fully the requirements of the Constitution; and that it was therefore unnecessary that the Commissioners' Court should have made provision for levying a tax at the time of making the contract or issuing the bonds, by an actual order to that effect.

The second specification of demurrer (Rec., 13) is that the petition "fails to allege that at any time any legal provision was made to raise a fund sufficient for the interest and sinking fund of such bonds."

The only perceptible difference between this and the former ground of demurrer is, that the latter denies that *at any time* a provision was made. The decision of the Supreme Court in the Mitchel County case disposes of this objection.

The third ground of demurrer is "that the tax levy of February 23, 1888, was not in contemplation of law any tax

levy, because such attempted levy was not made at a regular term of the Court (Rec., 13).

To this it may be replied that the petition in its third section distinctly states that the County at a regular term of said Court, 23d February, 1888, levied taxes, etc. This statement of a fact in the petition must be taken as true, for a demurrer cannot raise an issue of fact.*

The fourth cause of demurrer is equally technical: "The fifth paragraph of the petition and other parts of said petition setting up that taxes were levied for the purpose, and the levies did make provision to pay the interest on said bonds, are insufficient, in this, that they do not set out and do not purport that said purpose or provisions were predicated on any order or resolution to that effect entered on the minutes of the Commissioners' Court" (Rec., 13).

It is enough, we submit, in an action of this nature by an innocent purchaser upon the bonds or coupons of a county, to set forth that the act was performed by the proper authorities, without going further and alleging that orders or resolutions to that effect were entered on the minutes. In other words, an omission to enter upon the minutes an order by the authorities competent to act, is of no consequence, provided the fact remains that the duty referred to was actually performed, to wit, the making of the levy.

The fifth cause of demurrer is that a certain paragraph of the plaintiff's petition, and the exhibit relating thereto, ought to be stricken out, because neither the allegations in the paragraph nor the exhibit show that the bonds in question in this suit were in any wise connected with said order, nor do the allegations of the paragraph refer to the bonds here in issue (Rec., 13).

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*Should it become material, the Court are advised, that so far as bonds Nos. 16 to 25 are concerned, the fact is clearly set forth in the petition, and cannot be gainsaid, that the Commissioners' Court sat at its regular term, Feb. 12, 1889, and adjourned over to Feb. 13th; and that the issuance of these particular bonds, and the order for levying tax, to create a sinking fund and to pay interest on bridge bonds were contemporaneous.

This is not of sufficient consequence to require discussion.

The sixth ground of demurrer is similar to the fifth. The paragraph reads as follows: "That part of the petition is insufficient which alleges that the Commissioners' Court had in contemplation and intended when the taxes were levied to build the bridge in question, because it is not shown that any order evincing such intention was made on the minutes, or in any other way, and because the petition itself avers that no minute of such intention was made." (Rec., 13.)

In view of the fact that the decision of this case turns upon the question whether a provision had been made as required by the Constitution, and that our contention is that the Supreme Court of Texas has settled the meaning of this requirement, the objection recited by paragraph six of the demurrer becomes immaterial.

Upon a review of these several alleged causes of demurrer, it is apparent that the real question presented to the Circuit Court, and the sole question argued and determined in the Circuit Court of Appeals, was the meaning of the constitutional requirement to make provision for levying and collecting a sufficient tax for the interest and sinking fund necessary to pay these bonds. The only objection urged by the County was that its officers, to wit, the Commissioners' Court, had neglected their duty, and not made the provision required by the Constitution; and therefore that the bonds were illegally issued; and a purchaser in open market must be held to have taken notice of this defect.

It remains for the Court to deal with this single question. We have said that the true interpretation of the clause of the Constitution of Texas in question has been fixed by a decision of the Supreme Court of Texas, rendered six months later than the decision of the Circuit Court of Appeals. The Supreme Court of Texas having decided the precise question, the conclusion reached by the Circuit Court of Appeals is necessarily erroneous.

POINTS OF LAW.

I.

The Supreme Court of Texas, being the highest Court in the State, has decided the precise point upon which this case went off in the Circuit Court of Appeals.

The Supreme Court of Texas, in a carefully prepared opinion, has declared that the true construction of this requirement of the constitution is, that the provision with regard to levying a tax is met by the Legislature passing the acts authorizing cities and counties to build bridges and issue bonds therefor.

In the Mitchel County case it appears that bridge bonds had been issued by the County, by virtue of the statute, Chapter 18, General Laws of 1884. The sections of that statute pertinent to the issue of bonds are in terms identical with that of Chapter 141, General Laws of 1887, under which Travis County issued the bonds in suit.

The taxable values of Travis County during the years in ques.ion were sufficient to admit of the levy required by law for payment of interest and the creation of a sinking fund. This fact appears from the allegations of the fifth paragraph of the petition, and must be treated as admitted by the demurrer (Rec., 6).

The Mitchel County decision settles the law. The Court says:

"If the terms of the law are such that when the County has issued its bonds in compliance with it, the bondholder might resort to a court and by mandamus compel the county to levy a tax sufficient to pay the interest annually and to raise a sinking fund of not less than two per cent., then the provision would be sufficient under the Constitution."

The Supreme Court of Texas in reaching this conclusion *does not find it necessary to over-rule a previous decision.*

It thus would seem that the District Judge, MAXEY, who speaks for the Circuit Court of Appeals, in *Brazoria County* v. *Youngstown Bridge Company* (80 Fed. Rep., 10), an opinion cited and relied on in the opinion of the Circuit Court of Appeals (Rec., 20), is hardly sustained when he says, "This question has been repeatedly before the Courts of Texas and the same construction has been invariably placed upon the constitutional provisions," citing therefor *City of Terrell* v. *Dessaint*, 71 Texas, 773, and other cases, some of them of the Supreme Court of Texas.

In the Mitchel County case the County contended that the provision for levying and collecting taxes should have been made at the time the debt was incurred; and that the debt was incurred at the time of entering into the contract for the building of the bridge. Precisely this defense is set up in the present case; but the Supreme Court of Texas in unmistakeable terms decides that the levying of a tax is a ministerial duty, and that so long as the legislature has provided by law that such shall be the duty of the County Court, neglect or failure on their part to proceed to make the levy, or to enter upon their record an order to that effect, is not such a neglect to make provision as is contemplated by the language of the Constitution.

In the case at bar, the opinion of the Court below (NEWMAN, D. J.), Rec., pp. 18–20, will be seen to be largely taken up with the statement of the condition of the parties, and with the views of the court to the effect that section 7, Article 11, of the Constitution of Texas applies to all counties and cities of the State. The decision is rested upon the previous decision of *Brazoria County* v. *Youngstown Bridge Company* (just cited), reported 80 Fed. Rep., 10. That the Court below fell into error in holding that the Supreme Court of Texas was of opinion that such section 7 applied to the case of a County issuing bridge bonds, is apparent from the fact that in the Mitchel County case

the Court declined to decide the point but treated it as an open question.

The learned judge cites *Nolan* v. *State*, 83 Texas, 182, as an authority for the position that this prohibition of the Constitution applies to all the counties of the State. It will be seen upon examining this case that it is decided upon the ground that the amount of bonds issued had exceeded the amount authorized by the enabling act, as construed in connection with sect. 9, art. 8, of the Constitution. We may reiterate the statement of our main brief that no decision of the highest court in Texas has yet been made affirmatively holding that the requirement of section 7, article 11, of the Constitution applies to the issue of bridge bonds by Counties.

Such being the fact, we submit that the plain language of the section restricts it to "such works" viz: "seawalls, breakwaters or sanitary purposes" as are erected by counties or cities bordering on the coast of the Gulf of Mexico—a position taken by the Attorney General, and other counsel for the State of Texas, in their brief filed by leave of Court in the Mitchel County case.

Should it become necessary to examine critically the cases that have been cited in these opinions and others upon which the federal judges appear to have relied, it will be found to be a mistaken inference that the question now settled by the Mitchel County decision was considered in any one of these cases; and it will further appear to have been a mistake to assume that the Supreme Court of the State of Texas has ever gone so far as to apply the requirement of section 7, article 11, of the Constitution to any case where a County has been authorized by general law to incur a debt and issue bonds therefor.

II.

This Court will follow the construction of the State Constitution given to it by the Supreme Court of Texas.

It is a settled rule of this Court that the construction of a State constitution by the highest court of a State fixes the interpretation that will be followed by this Court.

"We recognize the importance of the rule *stare decisis*. We recognize also the other rule that this court will follow the decisions of a State court giving a construction to their constitution and laws, and more especially when those decisions have become rules of property in the States, and when contracts must have been made, or purchases in reliance upon them. And it has been held that this Court will abandon its former decision construing a State statute, if the State Courts have subsequently given to it a different construction. * * * * With much more reason may we change our decision construing a State Constitution when no rights have been acquired under it, and when it is made to appear that before the decision is made the highest tribunal of the State had interpreted the Constitution differently, when that interpretation within the State fixed a rule of property, and has never been abandoned. In such a case we think it our duty to follow the State courts, and adopt as a true construction that which those courts have declared." Per STRONG, J., *Fairfield* v. *County of Gallatin*, 100 U. S., 54–55.

This policy of the Court has never been departed from.

The justice of such a rule is conspicuously apparent in the case at bar. The defense set up by the County of Travis is at best purely technical. It in effect says, as do other cases where a similar defense has been raised, that the Commissioners' Court either neglected their official duty, or misconceived the meaning of the constitutional requirement. The Supreme Court of Texas now declares that an omission by the Commissioners' Court to order a tax levy at the very moment a debt is contracted for, to be met

by negotiating bonds, does not invalidate the bonds. The decision sustains the good name of the State of Texas, while it prevents the injustice that would attend the invalidating of a large number of bonds issued by local authorities for the building of bridges and like improvements.

The Circuit Court of Appeals, it seems, fell into error in supposing that the Constitution of Texas had been construed by the highest court of the State as requiring the official action of the County Court to levy a tax at the time it sought to create a debt.

The authorities cited by counsel for the respondent, beginning with 1 Wall., 175, are not in point, for the obvious reason that the Court is in those cases treating of the effect of a reversal by a State Supreme Court of a former decision. No question of "retroactive effect" is here involved.

III.

To reply more specifically to the brief filed on behalf of Travis County, we continue as follows:

The first and main contention on behalf of respondent is that the judgment in this case should be affirmed, because at the time that judgment was rendered it was in accordance with the construction given the Constitution and laws of the State of Texas by the Supreme Court of that State. This contention admits of two answers: It is not correct in point of fact; and, if true, it affords no reason for the affirmance of the judgment of which petitioner complains.

Nor is it true, as respondent asserts, that in the Mitchel County case the Supreme Court of Texas gave to the Constitution and laws of Texas a construction different from that announced in the previous decisions of that State. What was decided in the Mitchel County case was that, assuming section 7 of article 11 of the Constitution to be applicable to counties not bordering on the Gulf coast, then, considering section 2 of article 11 of the Constitution,

which provided that "the construction of jails, court-houses and bridges, and the establishing of county poor houses and farms, and the laying out, construction and repairing of county roads, shall be provided for by general laws," it was in the power of the legislature to make for counties the provision for sufficient tax, etc., required by section 7, and that an act of the legislature which, like chapter 141 of the acts of 1887, authorized the issuance of bonds in payment for county bridges, and provided that the Commissioners' Court should levy a certain annual tax sufficient to pay the interest and provide a sinking fund for the redemption of said bonds, constituted such a "provision" for a sufficient tax, as fully met the requirements of the constitutional provision in question, and rendered unnecessary to the validity of the bonds authorized by the act, that the Commissioners' Court should make any provision for levying a tax at the time of making the contract or issuing the bonds.

In our original brief we asserted that no decision of the Supreme Court of Texas could be found announcing a different doctrine from that laid down in the Mitchel County case. An examination of the cases cited by respondent on p. 4 of its brief fully justifies this assertion. In not one of these cases was the Supreme Court of Texas called upon to determine the effect of a legislative provision for the levying of a sufficient tax, etc. In none of the cases was the indebtedness or bonds, the validity of which was in question, authorized by an act of the legislature which itself made provision for the laying of a sufficient tax to pay interest and provide a sinking fund.

Hence, when the Circuit Court of the United States, which rendered the original judgment in this case, considered it was following the settled jurisprudence of the Supreme Court of Texas, it simply misunderstood the previous decisions of that court, and failed to observe the fundamental distinction between the case before it, and the cases which had been before the Supreme Court of the

State, namely, that in the case before it there was a general act of the legislature, enacted under express constitutional authority, which itself made such provision for a tax for interest and sinking fund for all bonds authorized therein as to render an express or contemporaneous provision for a tax by the Commissioners' Court entirely unnecessary.

But if the fact were otherwise, and it were true that the Circuit Court of Appeals decided the case according to what was the tendency or trend of the State decisions, does it follow that this Court should not now adopt and follow the actual construction finally placed by the Supreme Court of the State upon the Constitution and laws in question? The contention under discussion might have been urged as a reason, a very weak one, why in the first instance the petition for a writ of certiorari should have been rejected; but now that the writ has been issued, respondent must go further and show that the Court of Appeals was right, and the Supreme Court of the State wrong, in the construction respectively given by them to the laws of the State of Texas; and further that this is not a proper case for the application of the rule under which the federal courts follow the decision of the State courts in the construction of State Constitutions and statutes. An argument which proceeds upon the theory that, without deciding whether the Supreme Court of the State or the United States Court of Appeals was right, and notwithstanding the rule of comity above referred to, this Court should uphold the views of the Court of Appeals, because the latter was misled by inconsistent or uncertain decisions of the State Courts, is not of sufficient weight to call for further notice.

If petitioner be otherwise entitled to the relief he now seeks, his right to a reversal of the judgment, which has erroneously pronounced against the validity of his coupons, should not be affected by anything which occurred in a suit between Travis County and the King Iron Bridge and Manufacturing Company—a litigation to which this peti-

tioner is an entire stranger, and the existence and nature of which is not disclosed by anything in this record. If respondent considered that the judgment in that case afforded any defense to the suit of Albert Wade, the matter should have been presented by special plea in the Court below. No doubt both Travis County and the King Iron Bridge and Manufacturing Company were satisfied with the judgment of the United States Circuit Court, and hence neither appealed therefrom. The Bridge Company and its surety were relieved of responsibility for alleged defective construction of a portion of the bridge, and Travis County was relieved, or thought itself relieved, of its obligation upon the bonds issued in payment for the bridge.

Each party obtained its fancied relief at the expense of the holders of the bonds, who were not parties to the suit. Doubtless both were willing to sacrifice the bondholders. The trouble is, the latter were not willing to be sacrificed. Petitioner, Albert Wade, a bona fide holder for value of the bonds or coupons, brought suit, and the defendant, Travis County, saw fit to rest its defense upon what it considered a fatal omission on the part of the County Commissioners' Court. If the Circuit Court committed an error in sustaining this defense, the fact that it committed a similar error in an unappealed case, between other parties, certainly cannot affect petitioner's right to have the error in his case corrected.

Another reason urged by respondent against petitioner's being accorded the relief he seeks is, because "it appears that counsel raised no question as to provision being made for interest and sinking fund under the general law." (P. 8 of respondent's brief.)

If by this is meant that counsel for petitioner did not in the Circuit Court, and in the Court of Appeals, urge the legislative provision as a sufficient compliance with the constitutional mandate, we answer that the correctness of the statement is by no means admitted by petitioner. He

is otherwise informed by the local counsel who represented him at Austin. If it is meant that the failure of plaintiff in the court below to plead expressly the general act of the legislature, authorizing the issuance of his bonds, or to allege expressly that his bonds had been issued in accordance with the laws of the State of Texas, prevents him from urging the provisions of the general act of 1887 in support of the validity of the bonds attacked by respondent—we answer that it is not necessary to plead a general statute, or to allege a mere conclusion of law. The court takes judicial cognizance of general laws, and draws its own conclusions of law. The petitioner did all that could be required of him when he alleged in his petition the *facts* which showed that the bonds in question were authorized by the act of 1887. When, admitting these facts, respondent demurred, on the ground that petitioner had failed to allege that, at the time the bonds were issued, any provision was made for the interest and sinking fund, it was perfectly competent for petitioner to point to the act of 1887, and to urge, as a matter of law, that the legislative provision for interest and sinking fund was sufficient. The general act of 1887, of which the court takes judicial cognizance, always opposed an insuperable barrier to respondent's contention that a contemporaneous provision by the Commissioners' Court for interest and sinking fund was essential to the validity of the bonds in question.

Finally it is contended by respondent that the doctrine announced in the Mitchel County case is not sound, and should not, for this reason, be followed by this Court. This branch of the case has been sufficiently discussed in our original brief. If your Honors deem it proper, in connection with this case, to look at the petition for a writ of *certiorari* filed in this Court 13 April, 1899, by this respondent and signed by its present counsel, you will find an emphatic declaration in favor of the correctness of the Mitchel County case. In article xii of that petition,

referring to a judgment of the Circuit Court which is said to have construed the laws of Texas in the same way as the judgment of the Circuit Court of which we complain, the present respondent, through its present counsel, say to this Court, "That it will clearly appear from a reading of the opinion of the Texas Supreme Court in the said Mitchel County case that the judgment of the said Circuit Court, rendered out of deference to the rulings of the highest court of the State, is manifestly erroneous." Respondent's confidence in the argument it presents against the relief petitioner seeks, is shown by the statement made in article ix of its petition for a writ of *certiorari*, where it says "that said cause of *Albert Wade* v. *Travis County*, No. 267, is now pending in this Honorable Court upon writ of *certiorari* and, because of the decision in said Mitchel County case, will most likely be reversed and remanded."

FRANK W. HACKETT,
JOSEPH PAXTON BLAIR,
For Petitioner.

Filed April 14, 1899.

Supreme Court of the United States.

October Term, 1898.

ALBERT WADE, Petitioner,

vs.

TRAVIS COUNTY, Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR TRAVIS COUNTY.

FRANZ FISET,
CLARENCE H. MILLER,
Of Counsel for the County of Travis, Respondent.

BYRON S. ADAMS PRINTING CO., WASHINGTON.

No. 267.

Supreme Court of the United States.

October Term, 1898.

ALBERT WADE, Petitioner,

vs.

TRAVIS COUNTY, Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR TRAVIS COUNTY.

STATEMENT OF THE CASE:

This case was decided in the trial court against the plaintiff below and petitioner in this court, Albert Wade, on a general demurrer. It appears from the petition that he sued as the owner and holder of the coupons representing the interest due on all of the forty-seven bonds issued by Travis County to the King Iron Bridge and Manufacturing company for building a bridge across the Colorado river, that while the contract for building the bridge provided that the work should begin August 3rd, 1888, and the bridge be completed November 15th following, it is stated that pursuant to the terms of the contract, the county on December 6th, 1888, executed and delivered five of the bonds; on December 22nd, 1888, ten of the bonds; on February 12th, 1889, ten more; on July 3rd, 1889, caused the twenty-two remaining bonds to be issued and delivered; and that each bond bore the date on which it was delivered. A copy of the bond was not set out nor was it alleged, as in Mitchell County vs. Bank, 39 S. W., 628, that it appeared on the face of the bonds that they were issued under act of April 4th, 1887. It was not alleged that any provi-

ion was made at the time of creating the debt for levying and collecting a sufficient tax to pay the interest thereon and provide at least two per cent as a sinking fund; nor was it alleged, as in the case of Mitchell County vs. Bank, 91 Tex., 366, "that all of the said bonds were issued according to the laws of the State of Texas, which authorized their issue." The defendant countydemurred to the petition, among other things, because it contained no allegation that at the time the debt was created, for which the bonds were issued, provision was made for the interest and sinking, as required by section 7, article 11, of the the Constitution of Texas. The Circuit Court's opinion in the case will be found in 72 Fed. Rep., page 985. The court, in the opinion, states what was the contention of the plaintiff in the circuit court. It was, that in making the general levies of taxes stated in the petition, the county intended to provide a sinking fund and interest on the bonds in question. Plaintiff did not take the position nor raise the question in that court that is now presented in this court. We do not understand petitioner to state under subdivision IV, page 4, of his petition to the contrary. The case was affirmed on writ of error by the Circuit Court of Appeals for the Fifth Circuit on June 6th, 1897 (81 Fed. Rep., 742,). It appears from the opinion of the Circuit Court of Appeals that the contention of the plaintiff in error was (1) that the language of the last clause of said section 7, article 11, of the Constitution must be read in connection with the preceding portion of the section, and be held to apply only to counties bordering on the coast of the Gulf of Mexico; (2) that in the case of City of Waxahachie vs. Brown, 67 Tex., 519, the Supreme Court of Texas had taken that view of the last clause of section 7, and restricted its application to counties bordering on the Gulf, and that construction entered into and became a part of the contract for building the bridge and issuing the bonds in question. Both these positions are abandoned in this court. As to the first contention, on page 13 of the brief for petitioner, it is said "the Supreme Court of Texas assumed for the purpose of the Mitchell County case, that the above quoted article was applicable to the indebtedness then in question, and we shall make a like assumption in this case." No reference whatever is made in the argument to the case of City of Waxahachie vs. Brown and the

Circuit Court of Appeals construction of it is apparently satisfactory to petitioner.

The assignments of error are so very general and brief that no idea of the specific point intended to be covered can be satisfactorily gathered from them.

In view of the question that will arise during the argument as to whether Travis County has acquired any rights under the construction of section 7, article 11, of the State Constitution that obtained in both State and Federal Courts prior to the Mitchell County case, it is necessary to refer to the petition for certiorari and record filed in this court on April , 1899, in cause No. , Travis County, petitioner, vs. King Iron Bridge and Manufacturing Co.

The bridge company and the county had a controversy before the bridge, in consideration of the construction of which the bonds in question were issued, was accepted and the last twenty-two bonds were issued, as to whether the bridge was as high as required by the terms of the contract, and in compromise the respective parties entered into a new contract whereby, in consideration of the County issuing the remaining twenty-two bonds, the Bridge Company gave to the County an indemnity bond guaranteeing that the bridge should stand all floods in the river below a certain height for a period of ten years. The bridge was washed away by a lower flood within a few months after the indemnity bond was given, and the County brought suit in the United States Circuit Court for the Western District of Texas, upon the bond against the Bridge Company. The Bridge Company defended the suit upon the ground that the indemnity bond was without consideration, because the County bonds were void under section 7, article 11, of the Constitution. The Circuit Court, following the decisions of the Supreme Court of the State, sustained this defense, and July 13th, 1893, entered judgment for the defendant. The County recognized that the same rule of comity would lead the Circuit Court of Appeals and even this court to follow the jurisprudence of the highest State Court, and submitted as it had to do to that decision until after the writ of certiorari was granted in this case, when it applied for the writ of certiorari from the Circuit Court of Appeals for the Fifth Circuit. That Court denied the writ on the ground that it had no author-

ity to issue such writ, and further held that no relief was open to the County, because so great a time had elapsed since the entry of the Circuit Court's judgment in the case. The opinion of the Court of Appeals is in the record of the case. The case is now pending before this Court on writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, or the United States Circuit Court for the Western District of Texas.

I.

The judgment in this case should be affirmed, because in rendering it the Circuit Court followed the construction of section 7, article 11, of the State Constitution at that time adopted by the highest State Court. The opinion in the case was handed down by the Circuit Court on March 13th, 1896, and by the Circuit Court of Appeals on June 16th, 1897. The Mitchell County case was decided on January 10th, 1898.

Section 7, article 11, of the Constitution was first construed by the Texas Supreme Court on November 16th, 1888, in the case of City of Terrell vs. Dessaint, 71 Tex., 770; then followed, on December 5th, 1890, Citizen's Bank vs. City of Terrell, 78 Tex., 450; on November 4th, 1891, Biddle vs. City of Terrell, 82 Tex., 335; on April 15th, 1895, Bassett vs. City of El Paso, 88 Tex., 168; on December 23rd, 1895, McNeal vs. City of Waco, 89 Tex., 83; on November 30th, 1896, Howard vs. Smith, 91 Tex., 8. These cases all involved the question as to the powers of cities, under section 7, article 11, of the Constitution, but in view of the language of that section, the principle was plainly binding in the case of counties. This view was repeatedly held by the Federal Circuit Courts in Texas and the Federal Court of Appeals for the Fifth Circuit. The question in the Federal Court first came up in the suit already referred to of Travis County against The King Iron Bridge and Manufacturing Company, wherein the Court, in July, 1893, held the identical bonds issued by Travis County invalid. The next case was Quaker City National Bank vs. Nolan County, 59 Fed Rep., 660, decided January 31st, 1894. The Court in that case held the County bonds void because no provision had been made by the commissioners court at the time the bonds were issued, to assess and collect a sufficient sum to pay the interest and sinking fund. The Circuit Court of Appeals in that case, on

December 11th, 1894, 66 Fed Rep., 883, said: "The questions involved in this case are not open questions in this court. On reasoning which we have approved and still consider sound and sufficient, both of the final propositions submitted, have been decided by the Supreme Court of Texas adversely to the contention of plaintiff in error." Again, in Brazoria County vs. Youngstown Bridge Company, 80 Fed Rep., 10, the Circuit Court of Appeals held that bonds issued by the County to construct a bridge were not binding if no provision was made by the proper county authorities at the time the bonds were issued as required by section 7, article 11, of the Constitution. And again, in the case at bar, the Circuit Court of Appeals, 81 Fed. Rep., 742, held that the question was not an open one under the said decisions. After all of these decisions had been rendered the qustion for the first time was raised in Mitchell County vs. Bank, 91 Tex., 361, as to whether the general law did not make the necessary provision, and thus render it unnecessary for the County authorities to do so. In view of this state of the state and federal decisions, we submit that the judgment of the circuit cour was not erroneous, and to reverse it on account of the Mitchell County decision would be contrary to principle and authority.

Gepschke vs. City of Dubuque, 1 Wallace, 175, is in point. From that case it appears the Supreme Court of Iowa in a number of decisions upheld certain bonds issued to railroads by the municipal corporations of the state, but finally held that bonds issued under similar circumstances were not valid. This court declined to follow this latest state decision, and upon the authority of the earlier decisions upheld the bonds. The court said as to the earlier decisions: "We shall be governed by them unless there be something which takes the case out of the established rule of this court upon that subject. * * * It is urged that all these decisions have been overruled by the Supreme Court of the State in the late case of the State of Iowa vs. County, and it is insisted that in cases involving the construction of a state law or constitution this court is bound to follow the latest adjudication of the highest court of the state. * * * However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past." There was an elaborate dissenting opinion in which it was said, among other things, "In the present case, the court

rests on the former decision of the state court, declining to examine the constitutional question for itself."

In Railway Company vs. Twombly, 100 U. S., 81, a judgment for damages was recovered in the lower court, under a statute of the Territory of Colorado. While the case was pending on writ of error in this court, the statute was repealed, and it was urged that the judgment should be reversed with instructions to the court below to dismiss the suit. This court declined to do that and said: "A writ of error to this court does not vacate the judgment in the court below; that continues in force until reversed which is only done when errors are found in the record on which it rests, and which were committed previous to its rendition. Here there are no such errors."

In Rowan vs. Runnells, 5 Howard, 134, the court, in speaking of the decision of the state courts on their own constitution and laws, said: "But we ought not to give them a retroactive effect," etc. In Shelton vs. Hamilton, 23 Miss., 498, the court, in speaking of following the decisions of this court, when they are in conflict with its own, said: "We feel bound to adhere to our own decisions * * * Retrospective legislation has always been deemed unjust and oppressive. Whenever courts of law alter or change the rules of law they have once established, and on the faith of which, contracts have been made or rights acquired, many of the most injurious effects of retrospective legislation will follow such action.

In Hardigree vs. Mitchim, 51 Ala., 155, the court on this subject said: "When the courts have pronounced the law, and it has become known to and recognized in the community, though subsequent research and a more deliberate examination may compel a reversal of the decision, ignorance or mistake of the law cannot be invoked or imputed, to work a forfeiture of the rights acquired under the former decision. The peace of the community; the quieting of litigation; the repose of titles; the confidence judicial decisions should inspire; every consideration of policy, inducing the acceptation of the maxim that ignorance or mistake of law will not excuse, concur in compelling us not to give the decision in Martin vs. Hewitt, and subsequent cases, a retrospective operation, which would, contrary to the intention of parties, de-

feat acts done, or contracts executed, in reliance on former adjudications."

Chancellor Kent in Lyon vs. Richmond, 2 Johns. Chancery, 59, says: "A subsequent decision of a higher court, in a different case, giving a different exposition of a point of law from the one declared and known when a settlement between parties takes place, cannot have a retrospective effect, and over turn such settlement. * * * Fortunately for the peace and happiness of society, there is no such pernicious precedent to be found. This case, therefore, is to be decided according to the existing state of things when the settlement in question took place."

Wells, in his work on Res Adjudicata and Stare Decisis, section 528, says: "As to the effect of overruling decisions, it is necessary whenever practical, to prevent the overruling from operating on vested rights already attached; and where this cannot be done, the change should always be left to the legislature."

Rights have grown up under the law construed by the state and federal courts prior to the Mitchell County decision. The County failed in its cause of action against the Bridge Company under that view of the law; the federal circuit court held that it could not recover on the indemnity bond, because its own bonds given in consideration therefor were void under section 7, article 11, of the constitution. It would have been fatal for the County to have attempted to sue out a writ of error in that case, as is conclusively shown by the decisions of the circuit court of appeals in Quaker City National Bank vs. Nolan County, 66 Fed. Rep., 883; Brazoria County vs. Youngstown Bridge Company, 80 Fed. Rep., 10; and, the present case before the circuit court of appeals, in 81 Fed. Rep., 742. The judgment was rendered in this suit against the Bridge Company in July, 1893; and if the County had sued out a writ of error and the judgment had been affirmed, as it would necessarily have been, according to the decisions of the circuit court of appeals, the County would have had no right to a writ of certiorari from this court; at that time this court did not grant writs of certiorari excepting in cases of grave importance. Moreover, the chief ground of the petition for certiorari in the case at bar is the failure of the inferior federal courts to follow Mitchell County case. Therefore, the decision was irrevocably, at that time, against the County on these identical bonds,

and it should not now be denied the right of interposing the same defense in this case that was successfully interposed against it in the Bridge Company case. We therefore submit that to apply to this case the Mitchell County decision would be giving that decision a retroactive effect. The judgment of the trial court was right when rendered, because in consonance with the jurisprudence of the highest state court upon the question involved. The judgment was so far as could be known, confessedly right when made, and could not become erroneous by a change in the subsequent rulings of the state court.

We think the cases of Hoffman vs. Knox, 56 Fed. Rep., 484; Tilgman vs. Werk, 39 Fed. Rep., 680; and, King, Sheriff, vs. Dundee M. & T. I. Co., 28 Fed. Rep., 33, are applicable.

In the case in 28 Fed. Rep., 35, it is said: "While the national courts are bound to follow the settled construction given by the local court to the state constitution, I am not aware of any rule of law, or consideration of public policy, convenience or comity, that requires the former to go back and change its judgments or decrees to make them conform to the subsequent rulings of the latter. When this decree was made it was in strict conformity with the settled construction given to the state constitution by the state court so far as the later had gone, and this was all that could have been required. * * * And the subsequent contrary ruling of the state court in Crawford vs. Linn County, although a guide to this court in future cases, cannot operate retroactively and make a decree erroneous which was originally valid."

II.

The judgment of the trial court should be affirmed because it correctly decided the case upon the questions and issues as presented to it by the respective parties to the suit.

It appears that counsel raised no question as to provision being made for interest and sinking fund under the general law. It is a cardinal principle of appellate procedure, that questions of which a review is sought shall first be appropriately brought before the trial court for decision. The very idea of an appellate court makes that rule necessary. In the 2nd Encyc. of P. and P., page 516, and note z, the authorities from all of the states are collated, to the effect that a party is held on appeal to the position which he assumed below. And chapter 24 of Elliott's Ap-

pellate Procedure, beginning on page 410, is devoted to this subject, and the rule with all its limitations is fully stated. Judge Dillon expressed the doctrine in Garland vs. Holbaugh, 20 Iowa, 271, by saying: "A party cannot change his base after an appeal." This principle is fully recognized in the decisions of this court. Plaintiff does not allege in his petition as was alleged in Mitchell County case petition (91 Texas, 366) "that all of the said bonds were issued according to the laws of the state of Texas which authorized their issue," nor that the laws under which bonds were issued were expressly made part of bonds on their face (39 S. W., 628.). We therefore submit that even if this court should hold that the doctrine announced in the Mitchell County decision because it is the latest utterance of the highest state court is applicable, the plaintiff cannot invoke that doctrine for the first time in an appellate court.

III.

The first set of bonds in question were issued in December, 1888, while the case of City of Terrell vs. Dessaint, 71 Texas, 770, was decided November 16, 1888, and therefore the bonds were subject to the construction of the constitution announced in that case.

IV.

We further contend that the doctrine announced in the Mitchell County case is not sound, and should not, for that reason, be followed by this court. It is clear from the language of section 7, article 11, of the constitution that it was intended that the county authorities should at the time that any debt was created, make provision for interest and sinking fund. Any other construction would not carry out the object had in view in adopting this section of the constitution. The federal circuit court of appeals, in the cases cited, reached this conclusion in several cases in the exercise of its independent judgment, and evidently the earlier state decisions were to the same effect.

We respectfully ask that petition for certiorari be denied.

FRANZ FISET,

CLARENCE H. MILLER,

Of Counsel for the County of Travis, Respondent.

WADE *v.* TRAVIS COUNTY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 267. Argued April 26, 1899. — Decided May 15, 1899.

Mitchell County v. *Bank of Paducah*, 91 Texas, 361, which was an action upon interest coupons on bonds issued by the county for the purpose of building a court house and jail, and for constructing and purchasing bridges, in which it was held that as the constitution and laws of Texas authorizing the creation of a debt for such purposes require that provision should be made for the interest and for a sinking fund for the redemption of the debt, it was the duty of the court, in an action brought by a *bona fide* holder of bonds issued under the law to so construe it as to make them valid and give effect to them, is followed by this court, even if it should be found to differ from previous decisions of the Supreme Court of Texas, in force when the decision of the court below in this case was made.

THIS was an action brought in the Circuit Court for the Western District of Texas by the plaintiff Wade, who is a citizen of the State of Illinois, against the county of Travis, to recover upon certain interest coupons detached from forty-seven bonds issued by the defendant for the purpose of building an iron bridge across the Colorado River.

The petitioner set forth that in July, 1888, the defendant, being authorized so to do, entered into a contract with the King Iron Bridge Manufacturing Company of Cleveland, Ohio, for the construction of a bridge for public use over the Colorado River, the company agreeing to complete the same by November 15, 1888, in consideration of which the defendant

agreed to pay the sum of $47,000 in six per cent bonds, payable in twenty years after date.

That, prior to the making of such contract, to wit, February 23, 1888, the defendant, acting through its commissioners' court, levied for the year 1888 and subsequent years, until otherwise ordered, an annual *ad valorem* tax of twenty cents for general purposes, and an annual *ad valorem* tax of fifteen cents for road and bridge purposes, on each one hundred dollars' worth of taxable property in such county; that on February 13, 1889, the commissioners' court of the county levied for the year 1889 an *ad valorem* tax of fifteen cents on each one hundred dollars' worth of property for road and bridge purposes, and an *ad valorem* tax of five cents to create a sinking fund for bridge bonds, and to pay the interest on such bonds; that the defendant delivered to the bridge company upon its contract for erecting the bridge five bonds on December 6, 1888, ten bonds on December 22, 1888, ten bonds on February 12, 1889, and the remaining twenty-two of such bonds on July 3, 1889, such bonds being signed by the county judge, countersigned by the county clerk and registered by the county treasurer; that the several levies in question had not been appropriated for any other purpose by the county, or, at least, a sufficient portion of them remained unappropriated to pay the interest and sinking fund upon such bonds, and that it was the intention of the commissioners' court to use these levies with a view of providing an annual fund sufficient to pay the interest, and to provide the sinking fund required by law. The petition further averred that plaintiff purchased the coupons for a good and valuable consideration in open market, and that he is the legal owner and holder of the same; that on January 16, 1896, he presented such coupons to the county treasurer and demanded payment thereof, which was refused.

The county demurred to the petition upon six different grounds, the first and material one of which was that the petition failed to allege that "at the time the debt was created for which the bonds were issued, upon the coupons of which this suit is brought, any provision was made for the

interest, and at least two per cent sinking fund upon such bonds."

The Circuit Court was of opinion that, at the date of the execution of the contract for erecting the bridge, the commissioners' court should have made a distinct and specific provision for the interest upon such bonds and for a sinking fund, and thereupon sustained the demurrer and dismissed the cause. 72 Fed. Rep. 985.

The plaintiff appealed to the Circuit Court of Appeals, which affirmed the judgment of the Circuit Court. 52 U. S. App. 395. Upon plaintiff's petition a writ of certiorari was subsequently allowed by this court.

Mr. Joseph Paxton Blair and *Mr. Frank W. Hackett* for Wade.

Mr. Clarence H. Miller for Travis County. *Mr. Franz Fisat* was on his brief.

Mr. Justice Brown, after making the foregoing statement, delivered the opinion of the court.

This case involves the validity of certain bonds issued by the county of Travis in payment to the King Iron Bridge Manufacturing Company for the construction of a bridge over the Colorado River; and, incidentally, the weight to be given to alleged conflicting decisions of the Supreme Court of Texas as to the validity of such bonds.

As bearing upon this question, the following sections of Article XI of the constitution of Texas, upon the subject of "Municipal Corporations," are pertinent:

"Sec. 2. The construction of jails, court houses and bridges, and the establishment of county poor houses and farms, and the laying out, construction and repairing of county roads, shall be provided for by general laws."

"Sec. 7. All counties and cities bordering on the coast of the Gulf of Mexico are hereby authorized, upon a vote of two-thirds of the taxpayers therein, (to be ascertained as may be

provided by law,) to levy and collect such tax for construction of sea walls, breakwaters or sanitary purposes, as may be authorized by law, and may create a debt for such works and issue bonds in evidence thereof. But no debt for any purpose shall ever be incurred in any manner by any city or county unless provision is made, at the time of creating the same, for levying and collecting a sufficient tax to pay the interest thereon and to provide at least two per cent as a sinking fund; and the condemnation of the right of way for the erection of such works shall be fully provided for."

In apparent compliance with the sections above quoted, the legislature in 1887 enacted the following law, c. 141, § 1 :

"SEC. 1. That the county commissioners' court of the several counties of this State are hereby authorized and empowered to issue bonds of said county, with interest coupons attached, in such amounts as may be necessary, for the purpose of buying or constructing bridges for public uses within such county, said bonds to run not exceeding twenty years, and bearing interest at any rate not to exceed eight per cent per annum.

"SEC. 2. The commissioners' court shall levy an annual *ad valorem* tax, not to exceed fifteen cents on the one hundred dollars' valuation, sufficient to pay the interest on and create a sinking fund for the redemption of said bonds. The sinking fund herein provided for shall not be less than four per cent on the full sum for which the bonds are issued."

It is admitted that no provision was made on July 3, 1888, "at the time of creating" the debt, for levying and collecting a sufficient tax to pay the interest thereon, and two per cent for a sinking fund, as required by the second clause of section seven, if said clause be applicable to a debt incurred for building bridges. It was alleged in the petition, however, that in the February preceding the commissioners' court ordered an *ad valorem* tax of twenty cents for general purposes, and an annual *ad valorem* tax of fifteen cents for road and bridge purposes; and it also appeared that in the following February (1889) it ordered an annual *ad valorem* tax of twenty-five cents for general purposes; fifteen cents for road and bridge purposes; court-house and jail tax of five cents, and an *ad valorem*

tax of five cents to create a sinking fund for bridge bonds to pay the interest on said bonds.

Plaintiff insisted in the court below that the language of the last clause of section seven, requiring a provision to be made for the levying and collection of a tax to pay the interest and to provide a sinking fund, must be read in connection with the preceding clause of the section, and, taking the two together, that the last clause must be held to apply only to counties bordering on the Gulf of Mexico. Both the Circuit Court and the Court of Appeals, however, held that the last clause contained a separate and independent provision, and was applicable to the contract made by the county for the building of this bridge, and that, the petition of the plaintiff failing to show compliance with it, the contract was void and the bonds issued without authority of law. Both courts relied upon the construction given by the Supreme Court of Texas in numerous cases to this section of the constitution.

It is important in this connection to note that the opinion of the Circuit Court was pronounced on March 13, 1896, and that of the Court of Appeals on June 16, 1897. Since that time, it is asserted that the Supreme Court of Texas has taken a somewhat different view of the law, and an examination of these several decisions becomes important. In the earliest of them, *Terrell* v. *Dessaint*, 71 Texas, 770, 773, (1888,) which was an action on a promissory note given by the city in payment for material for water works supplies, it was squarely held that the last clause of section seven, above quoted, must be held to apply to all cities alike, and that the clause contained no word or words which restricted its application to the cities previously mentioned in the same section. "The language is general and unqualified," said the court, "and we find nothing in the context to indicate that the framers of the constitution did not mean precisely what it said; that is, that no city shall create any debt without providing, by taxation, for the payment of the sinking fund and interest." It was also held that a debt of $1500 for materials to extend its water works was within the clause in question, and that as the current expenses proper of the city exceeded its resources for

general purposes, and no appropriation was made for the payment of this debt, there could be no recovery.

In *Bassett* v. *El Paso*, 88 Texas, 168, (1895) it was held that the language and purpose of the constitution were satisfied by an order for the annual collection by taxation of a "sufficient sum to pay the interest thereon and create a sinking fund," etc., although it did not fix the rate or per cent of taxation for each year by which the sum was to be collected, but left the fixing of such rate for each successive year to the commissioners' court or the city council. It was contended that the ordinance, which provided for the issue of water works bonds, was void, because it did not levy a tax, but delegated to the assessing and collecting officers the power to make such levy from year to year. But it was said that "to so construe these provisions as to require, at the time the debt is created, the levy of a fixed tax to be collected through a long series of years, without reference to the unequal 'sums' that would in all probability be realized therefrom, instead of the collection annually of a certain 'sufficient sum' to pay the annual interest and create the sinking fund required by law, would be doing violence to the language used, and authorize, in cases where values rapidly increase, the extortion from the taxpayers of large amounts of money in excess of the amount necessary to satisfy the interest and principal of the bonds, and this in turn would invite municipal corruption and extravagance."

In *McNeal* v. *Waco*, 89 Texas, 83, (1895) plaintiff sued the city of Waco on a contract for building cisterns for fire protection, to recover the contract price for one and damages for refusing to allow him to complete the others. The petition failed to show a provision for taxes to pay interest and a sinking fund, or an existing fund for the payment; nor did the contract show facts from which the court could say that it was an item of ordinary expenditure. It was held that a general demurrer to the petition should have been sustained, and it was also held that the word "debt" included every pecuniary obligation imposed by contract outside of the current expenditures for the year. To same effect is *Howard* v. *Smith*, 91 Texas, 8.

Such was the construction placed by the Supreme Court of Texas upon the constitutional provision at the time when the case under consideration was decided by the courts below. It was held by the Circuit Court that the county commissioners' court should have made provision at the time the contract was executed, July 3, 1888, by levy of a tax or otherwise for a sinking fund, and the interest on the bonds issued for the erection of the bridge; that the levy made by the commissioners' court in February, 1888, could not be held applicable to the bonds in controversy, for the manifest reason that the contract for the erection of the bridge was not then in existence nor even in the contemplation of the parties, so far as the allegations of the petition disclosed; that the general levy made in February, 1889, could not be held applicable to the bonds of the bridge company for two reasons: first, because it was made some six months after the execution of the contract; and, second, because the order of the commissioners' court, authorizing the levy, made no reference whatever to the bonds in controversy nor to the contract between the county and the bridge company. The Circuit Court of Appeals came practically to the same conclusion.

Since these cases were decided, however, the Supreme Court of Texas has put a construction upon the constitution which fully supports the position of the plaintiff in this case. In *Mitchell County* v. *Bank of Paducah*, 91 Texas, 361, decided in January, 1898, the action was upon interest coupons attached to bonds issued by the county for the purpose of building a court house and jail, and upon others for constructing and purchasing bridges. An act had been passed in 1881 with reference to the creation of court house debts similar to the act subsequently passed in 1887 respecting bridge bonds, a copy of which is given above. The same defence was made — that at the time of the creation of the debts the county made no provision for levying and collecting a sufficient tax to pay the interest and sinking fund, although for the year 1881 the court levied a court house and jail tax of twenty-five cents on the one hundred dollars, repeated during subsequent years, and increased to fifty cents; and every year after the issue of the

bonds for bridge purposes the court levied fifteen cents on the one hundred dollars as a tax for road and bridge purposes. It was held, quoting *Bassett* v. *El Paso*, 88 Texas, 168, 175, that it was unnecessary to ascertain the rate per cent required to be levied in order to raise the proper sum and to actually levy that rate of tax at the time; that if the laws of 1881 and 1887 had never been passed, the county would have had no authority under the constitution to contract the debts represented by the bonds, nor to levy a tax for the payment of the interest and sinking fund on such debts. The power to do so could be derived from the legislature only. "We understand," said the court, "that the provision required by the constitution means such fixed and definite arrangements for the levying and collecting of such tax as would become a legal right in favor of the bondholders of the bonds issued thereon, or in favor of any person to whom such debt might be payable. It is not sufficient that the municipal authorities should by the law be authorized to levy and collect a tax sufficient to produce a sinking fund greater than two per cent, but to comply with the constitution the law must itself provide for a sinking fund not less than two per cent, or require of the municipal authorities to levy and collect a tax sufficient to produce the minimum prescribed by the constitution." It was held that the laws of 1881 and 1887, having been enacted for the purpose of putting into force the constitutional provisions, it was the duty of the courts to so construe the laws as to make them valid and give effect to them. The court came to the conclusion that these laws did make such provision for the levying and collecting of a tax as was required by the constitution, and that, in case the court had refused to levy the tax after the bonds were issued and sold, the bondholders would have been entitled to a mandamus to compel the commissioners' court to levy such tax as purely a ministerial duty. The bonds, with certain immaterial exceptions, were held to be valid obligations of the county.

It is quite evident that if this case had been decided and called to the attention of the courts below, the validity of the bonds involved in this action would have been sustained, and

the main question involved in this case is whether we shall give effect to this decision of the Supreme Court of Texas, pronounced since the case under consideration was decided in the courts below, and giving, as is claimed at least, a somewhat different construction to the constitution of the State.

We do not ourselves perceive any such inconsistency between the case of *Mitchell County* v. *Bank of Paducah*, and the earlier cases, as justifies the county, in the case under consideration, in claiming that the Supreme Court of Texas had overruled the settled law of the State and set in motion a new departure. No such inconsistency is indicated in the opinion in the *Mitchell County case;* so far as the prior cases are cited at all they are cited with approval, and there is certainly nothing to indicate that the court intended to overrule them. That court had not changed in its *personnel* since the prior judgments, except the first, were pronounced, and it is not probable that the judges would have changed their views without some reference to such change. Indeed, but one of the earlier cases was cited in the *Mitchell County case*, (*Bassett* v. *El Paso*, 88 Texas, 168,) and that supports rather than conflicts with the opinion. As we read them, they merely decided that some provision for payment must be made. In the *Mitchell County case* the question was for the first time presented whether the laws of 1881 and 1887 were constitutional, and whether action taken under these laws was an adequate compliance with the requirement that provision should be made "at the time of creating" the debt for a sufficient tax to pay the interest and to provide a two per cent sinking fund. It was held that they were. This overruled nothing, because the question had never before been decided, and the point was not made in the courts below in this case. We are simply called upon, then, to determine what is the law of Texas upon the subject, since, under Revised Statutes, section 721, the "laws of the several States . . . shall be regarded as rules of decision in trials at common law in the courts of the United States." While, if this case had been brought before this court before the decision in the *Mitchell County case*, we might have taken the view that was

taken by the courts below, treating the question as one hitherto unsettled in that State, we find ourselves relieved of any embarrassment by the decision in the *Mitchell County case*, which manifestly applies to this case and requires a reversal of their judgment.

But assuming that the later case was intended to overrule the prior ones, and to lay down a different rule upon the subject, our conclusion would not be different. In determining what the laws of the several States are, which will be regarded as rules of decision, we are bound to look, not only at their constitutions and statutes, but at the decisions of their highest courts giving construction to them. *Polk's Lessee* v. *Wendal*, 9 Cranch, 87; *Luther* v. *Borden*, 7 How. 1, 40; *Nesmith* v. *Sheldon*, 7 How. 812; *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436; *Leffingwell* v. *Warren*, 2 Black, 599; *Christy* v. *Pridgeon*, 4 Wall. 196; *Post* v. *Supervisors*, 105 U. S. 667; *Bucher* v. *Cheshire Railroad Co.*, 125 U. S. 555.

If there be any inconsistency in the opinions of these courts, the general rule is that we follow the latest settled adjudications in preference to the earlier ones. The case of *United States* v. *Morrison*, 4 Pet. 124, seems to be directly in point. The United States recovered judgment against Morrison, upon which a *fi. fa.* was issued, goods taken in execution and restored to the debtor under a forthcoming bond. This bond having been forfeited, an execution was awarded thereon by the judgment of the District Court, rendered April, 1822, which it was asserted created a lien upon the lands, and overreached certain conveyances under which the defendants claimed, dated February and March, 1823. The Circuit Court was of opinion that the lien did 'not overreach these conveyances. But the Court of Appeals of Virginia having subsequently decided that the lien of a judgment continued pending proceedings on a writ of *fi. fa.*, this court adopted this subsequent construction by such court, and reversed the decree of the Circuit Court.

In *Green* v. *Neal's Lessee*, 6 Pet. 291, a construction given by the Supreme Court of Tennessee to the statute of limitations of that State having been overruled, this court followed

the later case, although it had previously adopted the rule laid down in the overruled cases. See also *Leffingwell* v. *Warren*, 2 Black, 599; *Fairfield* v. *Gallatin County*, 100 U. S. 47.

In *Morgan* v. *Curtenius*, 20 How. 1, the Circuit Court placed a construction upon an act of the legislature in accordance with a decision of the Supreme Court of Illinois with reference to the very same conveyance, and it was held that that, being the settled rule of property which that court was bound to follow, this court would affirm its judgment, though the Supreme Court of the State had subsequently overruled its own decision, and had given the act and the same conveyance a different construction. We do not consider this case as necessarily conflicting with those above cited.

An exception has been admitted to this rule, where, upon the faith of state decisions affirming the validity of contracts made or bonds issued under a certain statute, other contracts have been made or bonds issued under the same statute before the prior cases were overruled. Such contracts and bonds have been held to be valid, upon the principle that the holders upon purchasing such bonds and the parties to such contracts were entitled to rely upon the prior decisions as settling the law of the State. To have held otherwise would enable the State to set a trap for its creditors by inducing them to subscribe to bonds and then withdrawing their own security. *Gelpcke* v. *Dubuque*, 1 Wall. 175; *Havemeyer* v. *Iowa County*, 3 Wall. 294; *Mitchell* v. *Burlington*, 4 Wall. 270; *Riggs* v. *Johnson County*, 6 Wall. 166; *Lee County* v. *Rogers*, 7 Wall. 181; *Chicago* v. *Sheldon*, 9 Wall. 50; *Olcott* v. *Supervisors*, 16 Wall. 678; *Douglass* v. *Pike County*, 101 U. S. 677; *Burgess* v. *Seligman*, 107 U. S. 20.

Obviously this class of cases has no application here. The bonds were issued in good faith for a valuable consideration received by the county, and were purchased by the plaintiff with no notice of infirmity attaching to them. If certain decisions, pronounced after the bonds were issued, threw doubt upon their validity, those doubts have been removed by a later decision pronouncing unequivocally in favor of their

validity. In the theory of the law the construction given to the bonds of this description in the *Mitchell County case* is and always has been the proper one, and as such, we have no hesitation in following it. So far as judgments rendered in other cases which are final and unappealable are concerned, a different question arises.

The judgments of the Court of Appeals and of the Circuit Court must be

Reversed, and the case remanded to the Circuit Court for the Western District of Texas for further proceedings in conformity with this opinion.